REPORTS OF CASES

ARGUED & DETERMINED

DURING THE YEAR 1864,

IN THE

HIGH COURT OF JUDICATURE

AT

Fort William in Bengal,

IN ITS

ORDINARY ORIGINAL JURISDICTION & ON APPEAL THEREFROM.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND THE PRINCIPAL MATTERS,

BY

EDGAR HYDE M. A.,

OF THE INNER TEMPLE, ESQ.,

Barrister at Law, and Fellow of Corpus Christi College, Oxford.

Calcutta:

MESSRS, THACKER SPINK, & Co.

1865

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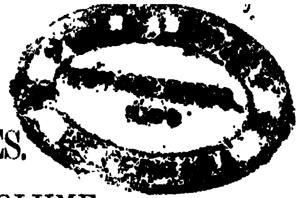


TABLE OF CASES.

REPORTED IN THIS VOLUME.

REPORTS

OF

HIGH COURT CASES

For 1864.

W. Brett *vs.* Schonerstedt.

Defendant who had taken the benefit of the Insolvent Act was sued by Plaintiff for a debt contracted previously to his Insolvency, the debt not having been entered in the Insolvent's Schedule at the time of his final discharge.

Held, Insolvent being a trader, that under the provisions of Sec. 60 *of the Indian Insolvency Act taken in connection with* 5 *and* 6 *Vic. c.* 122 *the discharge was good and valid, and that subsequently acquired property could not be attached for any debt discharged under the Insolvency.*

Woodroffe for the plaintiff.

Pittar for the defendant.

Levinge J.—In this action the plaintiff seeks to recover the sum of Rs. 920-2-9, the amount due by the defendant to plaintiff for advertisements inserted, and newspapers sold and delivered to the defendant at his request, between July 3, 1858, and September 30, 1863. The defendant admits the amount of the plaintiff's demand by letter dated October 1, 1863, but disputes his liability to pay for any item contracted previous to his passing through the Insolvent Court as a trader; and if defendant is protected from any debt due to plaintiff contracted previous to his discharge in 1859, the amount recoverable by the plaintiff in this action is reduced to the sum of Rs. 242. The plaintiff, in answer to this defence, has produced the

Jan. 22nd, 1864.

Insolvent Schedule, in which plaintiff has not been entered as a creditor, nor is the debt mentioned;—and he therefore contends that the defendant's discharge does not operate as to his debt, and that defendant is still liable. This is the only defect in the proceedings he is able to point out. The section of the Indian Insolvent Act, 11 Vic., c. 21, to which I have been referred is the 60th, which provides "that the discharge of the Insolvent, unless such order shall be made to the contrary, shall extend to, and shall discharge the Insolvent personally, and also his after acquired property, from all demands which would be discharged by a certificate under the Bankrupt Laws granted under a fiat having even date with the Insolvent's petition, or with the adjudication, as the case may be." The English Bankrupt Laws here in force at the time of granting the defendant's discharge would appear to be the 5th and 6th Vic., c. 122, and not the 6th Geo. 4, c. 16, to which I have been referred in the argument. The 37th Section of 5 and 6 Vic. c. 122, thus deals with the certificate. It provides "that every bankrupt who shall have duly surrendered, and in all things conformed himself, to the laws in force at the time of issuing the fiat of bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims or demands made proveable under the fiat, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter mentioned. The corresponding section to the above in 6 Geo. 4 c. 16, the previous Act, is the 121st Section to which I was referred, and the language is the same. On this latter section there has been a decision quite in point with the present case. I allude to *Davis* vs. *Shapley* 1 *B.* and *A.* 54, where it is distinctly held, that by the 121st section of 6 Geo. 4, c. 16 as to all debts which were proveable under the commission, the bankrupt is discharged, not merely from the debt, but from all remedies for the recovery thereof." I have found another very strong case on this subject—namely *ex-parte Holt—In the matter of Makin* 2 Mont and Ayr 562. In that case a trustee who was directed to convert the whole of the testatrix's property into money, and place the same out at interest upon mortgage for the benefit of the *cestui que* trust, employed the money in his business, paying interest to the party entitled

to it, and afterwards became bankrupt, and obtained his certificate amount of the trust money, either by himself or the *cestui que* trust, who was entirely ignorant of his misapplication of the trust money, and he continued to pay the interest to them after his bankruptcy the same as before. He became a bankrupt a second time when the *cestui que* trust discovered that he had not invested the money pursuant to the trust of the will. It was held that his certificate, under the first commission, was a bar to any proof of the amount under the subsequent fiat.—5 and 6 Vic. c 122, sec. 43 has further provided that a bankrupt is not liable on any promise to pay a debt discharged by a certificate, unless such promise be in writing. In the present case there is no promise in writing; on the contrary, a repudiation. I must therefore hold on the authorities that the debt due to the plaintiff prior to the date of the certificate is barred by the Insolvent Act 11 Vic., c 21. Plaintiff therefore is only entitled to recover the sum of Rs. 244. I say nothing as to interest, as it is admitted that, directly after action brought, that amount was tendered to plaintiff and lodged in court. As regards costs, plaintiff must have his costs up to date of lodgment of Rs. 242 in court, and defendant will have the subsequent costs of the suit. Costs on scale No. 2.

C. S. Hogg, *vs.* William Greenway and Others.

The Law allows a person the right to cease to be a Hindoo or Mahomedan in the fullest sense of the word, and to become a Christian, and to claim for himself, and his descendants all the rights and obligations of a British subject.

The Wills' Act Act XXV. of 1838 *applies to the Wills of East Indians whether domiciled within or beyond the Testamentary Jurisdiction of the High Court.*

An Executor will not be held liable for devastavit if the will was so framed as to mislead him, and he was not called upon to act differently from his own views, by any parties taking an interest under the Will.

Paul and *Lowe* for plaintiff.
Doyne and *Woodroffe* for defendants.

Jan. 12th 1864.

In this case one Rose Ann Greenway, living at Cawnpore, together with four of her children, was murdered there by the rebels in July 1857. She made her Will on the 27th of May of the same year appointing her sons the defendant W. Greenway, F. E. Greenway, and John Law Turnbull her executors, and her daughter Rose Ann Gee her executrix.

The Will was proved in the late Supreme Court in September 1857.

R. A. Greenway directed in her Will, that within two years after her death all the testatrix's property, except Indigo Factories, should be sold, and all debts due to her realised; and that after payment of debts, legacies, &c., the proceeds should be invested in Government Securities for her six Children; also that her share in the firm of Greenway Brothers should be disposed of by her executors at a fair valuation, estimated at the time of her death, when her interest would cease; but her partners were to be allowed eight years to pay by annual instalments all monies due by them to her. Certain Indigo Factories were not to be sold until eight years after her death, in order to enable her son F. E. Greenway to work them for himself for that time; and her partners, in consideration of such indulgence, were to advance Rs. 30,000 yearly to the said F. E. Greenway for that purpose. A number of legacies were left to her children and grandchildren.

The present suit was brought for the purpose of having the Will construed, and ascertaining who were entitled as legatees under it. The plaintiff prayed that the estate might be administered under an order of Court, and that an account might be taken of what estate had come into the hands of John Law Turnbull, deceased, and also into the hands of the defendant W. Greenway; and that in default, W. Greenway might be held personally liable for such loss, or such part thereof, as the estate of the said John Law Turnbull was insufficient to replace.

Evidence was given to shew that John Law Turnbull took the principal management of the estate of the testatrix, and the plaintiff alleged that whilst so managing the estate he greatly wasted it; and that his co-executor, the defendant W. Greenway, took no steps to prevent the alleged waste.

The following issues were agreed upon.

1.—Did Mrs. Greenway make the Will mentioned in the pleadings? And is such Will valid to pass the whole of the property thereby devised and bequeathed? And does the Wills Act apply thereto?

2.—Which of the parties named in the Will pre-deceased the testatrix, and which of them survived her? And at what dates did they respectively die?

3.—Did any of such persons have any, and what, issue? And if so, at what respective dates did such of them as died, die?

4.—Who are the parties now interested, and to what extent are they interested under the Will?

5.—What is the construction as to the power of the executors in allowing the remaining partners of the firm of Greenway Brothers to pay monies due by them to the testatrix; and did it apply so as to give power to the executors to refrain from realising her interest in that firm until eight years had elapsed?

6.—Was the said power subject to any, and what, condition? And if so, was such condition complied with? And if not, how has the non-compliance therewith affected the defendant W. Greenway, and the estate of John Law Turnbull deceased?

7.—What is the construction of the Will as to the legacies to the children, and for what time were such legacies to be paid?

8.—What is the construction of the Will as to the legacy to the grandchildren? Was it to be a legacy to each grandchild, or to the class?

9.—*What is the construction of the Will as to the right of survivorship among the grandchildren and great grandchildren?*

10.—Is the plaintiff entitled to an account as against the defendant W. Greenway and the executor of J. L. Turnbull, or either, and which, of them?

11.—Is the defendant W. Greenway liable to any, and what, extent, for *devastavit* committed by himself and his co-executor, or either of them?

12.—Should a receiver be appointed, and ought the defendant W. Greenway to be restrained from acting as executor?

With reference to the last issue, Mr. Justice Morgan, on the 28th of September 1863, granted an injunction order against the defendant from acting as executor, and at the same time appointed a receiver to the estate, allowing Mr. Greenway, however, to retain Rs. 10,000 subject to any order of Court that might hereafter be made.

Levinge J.—I have formed my opinion upon what should be my judgment, and shall proceed to dispose of this case. As to the first issue, it is admitted that Mrs. Rose Anne Greenway made the will in the pleadings mentioned. But whether the Wills Act XXV. of 1838 applies to Rose Anne Greenway's will is the material question. It was argumentatively put forward by the Counsel for the defendant William Greenway, that the lady at the time of her death was if not quite a Mahomedan, yet bound by Mahomedan laws, and therefore incapable of taking the benefit of the British law. Failing to prove that such was her status, it is said she was but an East Indian, and therefore incapable of enjoying the full benefit of the British law. In short, every attempt was made, and many ingenious arguments put forward, by Mr. Woodroffe, William Greenway's Counsel, to take this case out of the Wills Act. If it was not meant to show that Rose Anne Greenway had at time of her death but the status of a Mahomedan, what was the meaning of examining Mr. William Greenway to show that Rose Anne Greenway had buried her mother in her garden, or proving that religious ceremonies were performed by her on the

death of her mother—the burning of a lamp over her grave, and employing a *Faquir* to watch the tomb, and paying him a monthly salary for many years. Such acts as these rendered by a Christian lady, which most undoubtedly Rose Anne Greenway was, simply to my mind proves the fact that she wished to continue certain rites that her mother may have cherished, and to conform to the practice, in this respect, adhered to by the Mahomedans, many of whom lived in her neighbourhood. In my opinion it shows only that she respected the feeling of Mahomedans, and kept up ceremonies to satisfy others more that herself, and to do that which might be consonant to the belief and faith of her mother.

Those acts alone would not prove the lady had not ceased to be a Mahomedan if she had ever been one, which she undoubtedly never was. Rose Anne Greenway is admitted to have been a daughter of an East Indian officer born in this country, whose father was British, but who had a son by a Native woman of India, that son being Rose Anne Greenway's father, Lieutenant Samuel Anderson of the Bengal Army. There was evidence given to prove that Rose Anne Greenway was reared by a Mahomedan nurse and had a foster sister at Cawnpore, who used to live with her. It is clear that from the time of Rose Anne Greenway's entry into the Kidderpore School she was a Christian, and ceased to be a Mahomedan if she had been brought up as such, of which there is no evidence excepting that she had a Mahomedan nurse. Her earlier history is left in obscurity. No Mahomedan or Hindoo orphan is admitted into the Kidderpore School. This is proved. She was married as a member of the Church of England in St. John's Church in this city, to her husband, Mr. Samuel Greenway, according to the ceremonies of the Church of England; she reared her children as Christian; she lived as such; read her Bible and attended divine service, and, as far as I can see, was to all intents and purposes a member of the Church of England. Yet it is argued, because the mother was Mahomedan, and was never married, and her child Rose Anne Greenway illegitimate, therefore she retained, and had the status of a Mahomedan. The case in the Privy Council of *Abraham vs. Abraham* recently decided, shows that change of religion alone

does not divest a person of the rights, privileges, and obligations of a Hindoo or Mahomedan, and that such change would not of itself be sufficient to give a right to a Mahomedan or Hindoo convert to say, that, by reason of that conversion alone, he was entitled to have the same laws administered to him as to a British subject. But it is clear that the law allows a person the right to cease to be a Hindoo or Mahomedan, in the fullest sense of the word, and to become a Christian, and to claim for himself and his descendants all the rights, and obligations of a British subject.

It is a question of evidence whether a person has exercised that choice. The law says a Hindoo or Mahomedan may choose to belong to any other caste, or sect, or persuasion. Pressed by the argument of Mr. Woodroffe, I have to decide whether Mrs. Greenway by her acts got rid of the status, it is said she derived from her mother; and I am prepared to decide she did; and this is to be observed, that if a Mahomedan or Hindoo, born as such, and living, and brought up as such, can divest herself of the law attaching to either sect or portion, can a person situate as Rose Anne Greenway was, remove herself from what has been termed the status derived from her mother. We have the fact, that only East Indians were admitted to the school at Kidderpore. It has been proved she was married according to the rites of the Church of England to an East Indian. Both were Christians and married according to the ceremony of the Established Church; and, as I said before, she reared her children as Christians; and Mr. W. Greenway, the defendant, is one. She read her Bible and attended Church, and I have heard it ruled that attending divine worship in a Roman Catholic Chapel was evidence of a person belonging to that faith; and it strikes me it is strong evidence of the fact. Rose Anne Greenway was therefore a Christian East Indian, living such, and dying such. I have to decide what law is this Will to be administered under. Is it to be proved and acted on under Mahomedan or Hindoo law? Certainly not, for the testatrix was neither one nor the other; that it is to be administered under British law and acted on as the Will of any British subject dying in Calcutta, East Indian, or British born, such is my opinion. It appears from the authority of

Musleah vs. Musleah, I Boulnois 234 that this Court, where the parties are neither Hindoos nor Mahomedans, is bound to administer English Law as to land in the Mofussil, and it appears to me that an executor, as the defendant William Greenway, proving this Will in this Court, is bound by the English law administered in this Court; and the intentions of the testatrix are to be carried out, and will be construed, and acted on according to English law; in other words, that her Will is governed by, and acted on, by the Wills Act. It certainly appears to me, that as neither the Mahomedan nor Hindoo law applies to this case, the *lex loci* or the British law, that is the law relating to Wills, in force in this Court for British subjects, is to govern this case. Such seems to me to have been the opinion of the Judges in the case before mentioned, (*Musleah vs. Musleah*) where Chief Justice Colville states (241) "that so much of the law of England as is applicable to the situation of the people, and as is not inconsistent with the written law, not only ought to be, but theoretically, though not practically, is the law of the land for all classes except Hindoos and Mahomedans." This Will has been proved by the defendant in this Court. The deceased acquired her own property, dealt with it under the form of a regularly drawn English Will, and the document is therefore, it seems to me, affected by the Wills Act. No other than British law is applicable, and the parties are entitled to every portion of that law, common and statute. The defendant William Greenway, as executor, has availed himself of the law relating to the probate of wills of British subjects by taking out probate, and even went the length of swearing in his affidavit for that purpose, that Rose Anne Greenway was a British born subject. I am not going to say how far that act and affidavit operate as an *estoppel*; I would not say that the executor is bound by the affidavit, for his swearing that Rose Anne Greenway was a British born subject appears to have been a mistake or oversight.

The English law being applicable, it is said by Counsel for William Greenway that the Wills Act XXV. of 1838 does not apply to an East Indian who resided and died outside the limits of the Ordinary Civil Jurisdiction of this Court, and the mere taking out of probate

has not that effect; and he points to the provisions of Act XX. of 1841, and urges, that that Act being still in force, the Wills Act is not applicable; but it seems that that Act was not passed for the purpose of affecting probate of a Will, or in any way to regulate the subjects of devises or bequests, but simply to provide a means to enable the representative of a deceased person other than a British born subject, dying in the Mofussil, to obtain a certificate to call in debts. It would seem to me, that unless the operation of a statute is expressly excluded, or unless there are words showing it is not applicable, it might be applied to an East Indian as well as to a British-born subject. There are no words in the Wills Act showing that it is not to apply to the East Indian. On this branch of the argument the third section of the Act has been quoted. The following are the material words of that clause:—" This Act shall only extend to the Wills of persons whose " personal property cannot, by the law of England, pass to their re- " presentatives without probate or letters of administration obtained "in one of her Majesty's Supreme Courts of Judicature." If this lady had died in England, leaving this Will, her personal property, by the law of England, would not have passed to her representatives without probate; and if so, as British law is to be applied to other than Mahomedans and Hindoos, it seems to me that this Wills Act is applicable to her Will. By holding the Wills Act to apply to different legacies left to children, that of Rose Anne Greenway will not lapse, when those children who perished in the common catastrophe with their mother left offspring. I cannot help adding that it is much to be regretted that the question raised before me for decision has not been made the subject of legislation. East Indians may be wisely excluded from the operation of certain criminal statutes, but how far they are to be excluded from the benefits of British laws, statute and common, administered on the civil side of this court, ought not to be left for one moment in doubt. If under the criminal law British-born subjects are to have the privilege of a trial before a jury in the High Court, no matter how remote from Calcutta the offence may be committed, it can hardly be expected that that privilege should be extended to East Indian-born British subjects.

Before I consider the acts of waste charged against Mr. Greenway, or discuss the provisions of the will upon which I am called on to express an opinion, I will go to the question of the deaths of the children, who are alleged on one side to have survived Mrs. Greenway, and on the other to have died first. The rule of law is clear on this subject, and must be my guide in deciding this issue. The question of survivorship is, by the law of England, a matter of evidence merely, and in the absence of evidence, there is no rule or conclusion of law on the subject, and as the *onus* or proof lies on the representatives of the legatee, they cannot claim the legacy unless they can produce positive evidence that he was the survivor. 2 *Williams' Executors* 1084, 5th edn. It has not been made out that Mrs. Gee and Mrs. Sutherland survived, and it cannot be presumed that they did. There is no evidence on record touching their death. As to Thomas Greenway, I must say I do not believe two of the three witnesses produced on the part of the plaintiff. I believe the old servant who received the letters. He was a jemadar and always acted for Thomas Greenway. He has stated how he saw Thomas Greenway come from the entrenchments with his two children on the 27th. I believe his evidence from the clear and circumstantial way in which he told what he knew. He did not, however, see the old lady. If I believe him, I must disbelieve the witness of the defendant. If the children were brought back, they would have been brought back by this jemadar, and not by the man who admits he was a servant of the Nana. I do not believe that man brought back the two children, for if it had been possible to have saved them, it would not have been by his hand, but by the assistance of the old servant they would have been rescued. I do not believe the witness for the defendant saw Rose Anne Greenway at that time. I can understand his now coming forward as the saviour of the two children, in the hope of reward from the members of the family. I believe Mrs. R. A. Greenway was in confinement, but there is no proof that she died before Thomas Greenway. The two other witnesses for the plaintiff say she died a natural death, but one says she was carried off by the executioner. If she died a natural death, why was she not buried decently? It is not proved to my satisfaction that she died before Thomas Greenway. I believe he died on the 27th

June. I do not believe the evidence as to when Mrs. Greenway died. The want of satisfactory evidence as to when she died, coupled with the statements in the executors' affidavit that she died on the 7th July, supports the presumption that she survived Thomas Greenway and those two children. It may not be material to find whether she survived her children or not, considering as I do that the Wills' Act applies to her will; but I do find and I believe, from the evidence, that she did survive them.

I now come to the construction of the Will. The first charge against William Greenway is, that he did not invest from time to time in Government Securities the assets of the deceased. I think the fair construction to put on the first clause of the will is, that he should not be charged with waste till two years after the decease of the testatrix. The first clause of the will directs a sale after two years, and that the proceeds should be realised, and the aggregate proceeds invested. I believe I am safe in holding that no Court of Equity would hold an executor liable for a *devastavit*, if the Will was so framed as to mislead him, and he was not called on to act by any parties taking an interest under the Will differently from his own view. There is no proof Mr. William Greenway was so called on, and in my opinion, he ought not to be charged with a *devastavit*, till after the expiry of two years from Mrs. Greenway's death. But, if on taking the account, it can be shown that after that period large amounts were realised, and not invested in Government Securities according to the direction of the Will, then Mr. Greenway may be charged with the difference of interest between the two per cent. allowed him by the banks, and the rates in Company's paper at the time he should have invested. If it should appear he had got in a large sum and little remained to be realised, he would be clearly wrong in leaving the money in the Delhi or other bank on a deposit receipt, bearing only two per cent. interest, for he should have invested in Government Paper; but if large sums remained to be realised, he cannot be charged with *devastavit*, owing to the terms of the will. It will not, however, do for Mr. Greenway to say that he is not in any way responsible, inasmuch as he left all the duties under the Will to be performed by his executor, for if any

executor, undertaking a trust declared on the face of a Will, neglects his duty he is bound most faithfully to discharge his trust, or stand by the consequences that follow from his own laches.

Then as to the third clause, which I must read in conjunction with the fourth clause, it is clear the executrix distinguished between what was due by the firm to her, and the assets of the firm capable of being realised on her death. Her interest ceased on her death, and under the third clause it was the duty of the executor to get in the value of her share capable of being immediately realised. If Mr. Greenway has neglected to do his duty he has no escape at law. There must be an account of Mr. Greenway's interest in the firm, irrespective of what was due to her from the firm, and if that was not got in, and there was a loss, Mr. Greenway must be liable for the value of the estates and assets *in esse* which were not got in. The fourth clause provides, that eight years be allowed the remaining partners of Greenway Brothers to pay the money due to Mrs. Greenway's estate. Mr. William Greenway could only be held liable for the instalments due, prior to the date of the insolvency of the firm, because the lady had herself placed confidence in the firm. Mr. Greenway was bound to let the firm have eight years allowed them by the will to pay off their debt. Mr. William Greenway was, however, bound to see the instalments regularly paid in, and if he left them in the hands of the partner, his co-executor, Mr. Turnbull, allowing that gentleman to retain the amount for the purposes of trade, and the property became lost, William Greenway must be held responsible for the consequence of the breach of trust.

As to the legacy of Rs. 2,000 to the grandchildren, I have no hesitation in saying she meant each grandchild to take Rs. 2,000, as she gave Rs. 1,000 to each great-grandchild.

Nothing turns on the Rs. 200 to be paid monthly to each child; there was no one but himself and Mrs. Turnbull to receive it. I should say it was a matter thoroughly personal, as it was a monthly stipend for the maintenance of each child.

As to the costs, it may benefit William Greenway the executor that should express my opinion, and I am prepared to be bound by what

I say, should this case again come before me for a final order with respect to costs, after the taking of the accounts which I shall direct, and my opinion may have some weight with any other Judge who may have to take up this case on the question of costs, and who would not perhaps have the same opportunity of hearing the whole case so fully discussed at a subsequent hearing. It appears to me that unless waste is clearly made out, I should give Mr. William Greenway his costs, as the Will must, under any circumstances, have been construed by the Court, and the period of the deaths of the legatees ascertained or decided. But as Mr. Greenway, after submitting to the jurisdiction, now contests possibly to escape the charge of waste, if he be not satisfied with the decision of the Court, I am clearly of opinion that I should not put the estate to these costs. But if the matter ended here, and Mr. Greenway was found to have committed laches in some respects, as far as costs are incurred in proving that neglect, I would certainly hold him liable for those costs. But at present I decline to make any order as to the costs, for I think it objectionable so to do before the whole case is concluded, although I might do so if both sides were agreed, to avoid litigation, and thus save the estate from further expense.

As the parties ask me to find the matter on the record, I declare that Mr. Thomas Greenway left two sons surviving him and I find that Francis Edward Greenway survived the testatrix, and left four children. The charges as to the Indigo Factories have been abandoned by the plaintiffs. I decree an account according to my judgment, and that this suit be supplemental to *Greenway* vs. *Hogg*.

PERSAUD DOSS *vs.* DENONAUTH DEY.

The admission to a third party in writing that a sum is due is not such an acknowledgment of a debt as to remove such debt out of the statute of Limitations.

Woodroffe for the plaintiff.

Graham for the defendant.

Levinge J.—This is a suit to recover the sum of Rs.

Feb. 23rd 186[illegible]. 385 lent by Sreemutty Ramdhone Dossee, in the year 1843, to Moddoosoodun Dey, and the plaint seeks to obtain

a decree for that sum and interest thereon at the rate of 12 per cent. from date of loan, making altogether the sum of Rs. 1,322. The principal sum was secured by a deposit of Muddoosoodun's title deeds of a house situate in Burra Bazar, in this city. No interest has been proved to have been paid on the loan, and there being no written contract, it is matter of conjecture whether any rate was agreed upon by Ramdhone and Muddoosoodun, both being dead. In the defendant's written statement it is alleged that by the terms of the contract no interest was payable, but no proof has been given of this averment. It is apparent that unless there be a written acknowledgment sufficient to take this debt out of the Act applicable to the Law of Limitation, it must be barred by lapse of time, and I have to decide whether the written acknowledgment of the existence of this debt signed by the defendant who is one of the heirs and legal representatives of Muddoosoodun Dey, and dated the 27th October 1862, is sufficient in law for that purpose. The following allegation appears in the plaint :— "the plaintiff claims exemption from the Law of Limitation as against the said Denonauth Dey, by reason of his admitting that the said debt, together with a large amount of interest thereon, was due by an acknowledgment in writing, signed by him on the 27th October 1862, in the words and figures following :—

"Muddoosoodun Dey in his lifetime borrowed Rs. 350 upon deposit of title Deeds of the said last mentioned house, which have not been redeemed ; the principal sum of Rs. 350 with a large amount of interest is still due to Persaud Doss Dutt."

The Indian Law of Limitation is Act 14 of 1849, and the Section applicable to this case is the 4th. The following are the words of the Section :—

"If in respect of any legacy or debt, the person who, but for the Law of Limitation, would be liable to pay the same, shall have admitted that such debt or legacy, or any part thereof is due by an acknowledgment in writing, signed by him, a new period of Limitation, according to the nature of the original liability, shall be computed from the date of such admission."

The above acknowledgment relied on is contained in a paragraph of an answer of the defendant to a bill in equity, filed against him and others, by his brother Rakhalchunder Dey, and therefore was not made to the plaintiff, and I have to decide whether an acknowledgment in writing signed by the party liable to pay the debt to a third party or stranger, is sufficient to take the case out of the operation of the Act.

I believe this is the first time this Court has been called upon to decide the point, and I fully admit that it is one that is not free from doubt. A variety of conflicting decisions were passed upon the construction of the 1st Section of Lord *Tenterden's Act* 9. *G.* 4 *c.* 14.— The material part of the first Section is as follows :—

" That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, &c., unless such acknowledgment, or promise, shall be made, or contained by, or in some writing to be signed by the party chargeable thereby." It will be seen at once that there exists considerable difference in the language of Lord Tenterden's Act and the Indian Law of Limitation quoted above. Under Lord Tenterden's Act there must have been an acknowledgment from whence a promise to pay could be implied, whereas under the Indian Act it would appear that the acknowledgment need not imply a promise, but should, I apprehend, imply a liability. Under Lord Tenterden's Act it was held *Mountstephen* vs. *Brook* 3 B, and A. 141, that where, in a deed between the defendants and a third party, the defendants acknowledged within six years the existence of the debt, and the plaintiffs were wholly strangers to the deed ; this was sufficient to take the case out of the Statute. That case was followed by many others adopting the same view, on the ground that the Statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidence of such payment. However in a later case *Greenfell* vs. *Girdlestone* 2. Y. and C. 676 Baron Alderson observed, (in reference to the statement of counsel

that an acknowledgment by the debtor to a third person, took the debt out of the statute :)—" that will not do ; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt it would not take it out of the Statute." And Baron Alderson adopted the principles laid down by Lord Camden in *Smith* vs. *Clay* 3 *Brb. C. C.* 639, *viz.* that a Court of Equity has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth the Court with activity but conscience, good faith, and reasonable diligence. Laches and neglect are always discountenanced." From the decision of *Greenfell* vs. *Girdlestone* to the present day the law in England has not been definitively settled. This appears so from the cases collected in the 988th Section of the last edition of *Taylor on Evidence.* Under Lord Tenterden's Act it is settled that the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and unqualified admission of a still subsisting *liability,* from which a promise to pay will be implied by law ; but it has been doubted, as I have already mentioned, that an admission to a stranger that a sum is due will suffice, as such an acknowledgment to a third party can hardly imply a promise to pay the creditor. In addition to the cases cited in argument before me, and those that are to be found in *Taylor on Evidence,* I would refer to the most recent, *viz. Moodie* vs. *Banister* 28 *L. J.* Ch. 881, in which V. C. Kindersley says, that an acknowledgment of the existence of a debt is not necessarily either a contract or a promise to pay, and there can only be cause of action where there is a promise to pay. He alludes to the fact that the courts had gone so far as to decide that an acknowledgment of a debt did amount to a promise to pay, but that the law is now altered. He held the acknowledgment sufficient in that case under the 3 and 4 W 4 c 42. sec. 5, to take the debt out of the Statute, but it was a statement made by an executrix in the exercise of a duty towards co-legatees in settling for the debts of the testator. But that reasoning cannot apply here.

I think the 4th Section of Act 14 of 1859 must mean something more than an admission of a debt, and that to take the case

out of the operation of the Act, there must be the acknowledgment of a liability to pay, and that the mere admission in writing of a third party that a debt is unpaid and still due, will not avail. Some operative force must be given to the word acknowledgment. If admission of the debt in writing signed by the party chargeable, was all that was required to take the debt out of the Statute, we should not find the word acknowledgment used in the Section, but as it is there, force and effect must be given to it and its meaning construed. In the present case the statement in the answer seems to be an admission that the debt is due, not an acknowledgment of liability to pay. I take the meaning of the word as used in the Act to imply a liability or obligation, an acknowledgment that the party to whom the debt is due has still a right to recover; but I do not see how an admission which the plaintiff is pleased to term an acknowledgment, made to a stranger, can thus amount to an acknowledgment within the meaning of the Act.

As I am of opinion that the debt is barred by efflux of time, I need not go into the evidence on the issues of *plene administravit*; but I may say that if the debt was not barred, I am satisfied that there are assets come to the hands of the defendant sufficient to satisfy the plaintiff's claim.

I dismiss this suit with costs, to be taxed on scale, No. 2, against plaintiff.

CALEB LADD (plaintiff,) APPELLANT *vs.* PARBUTTY DOSSEE, (defendant.) RESPONDENT.

The representative of a deceased person may be sued in that Court within the jurisdiction of which the Cause of action with the deceased person arose.

Doyne and *Newmarch* for the appellant.
The respondent was unrepresented.

Jan. 14th 1864. This was an appeal from the decision of Justice Morgan. The suit was originally brought to recover from the defendant, as the widow and representative of Hullo-

dhur Paul, deceased, the sum of Rs. 17, 405 for money had and receivied by the deceased in his lifetime to the use of the plaintiff at Calcutta, between 18th October, 1859, and 11th August, 1862.

The defendant who resides in the Zillah of Hooghly and out of the local limits of the Ordinary Original Jurisdiction of this Court, entered an appearance, but made no defence at the trial, and the suit, which was heard on the 28th July, was dismissed, on the ground that the Court had no jurisdiction over the defendant.

Morgan J.—delivered the following judgment.

The defendant is described as "of Chotrah in the Zillah of Hooghly, widow and legal representative of Hollodhur Paul, late of Calcutta." The husband died leaving property in various places (where in particular does not appear) and the Hooghly Court granted his widow a certificate under the Act for the collection of his debts.

The ground of jurisdiction is said to be that the cause of action arose within the limits of the local jurisdiction of this Court. The matters between the plaintiff and Hullodhur Paul, out of which the plaintiff contends his right of suit first arose, took place in Calcutta. Admitting that the defendant as her husband's representative may be liable to be sued, should the suit against her be maintained within the local jurisdiction, in my judgment if she dwells elsewhere no liability to suit *here* is transmitted to her, or necessarily accompanies the right of suit which the plaintiff may have against her, on account of her husband's transaction. The whole cause of action against her has not arisen within the local limit. The suit is accordingly dismissed.

The plaintiff now appealed from this decision. The appeal was heard *ex-parte* on the 14th of January, when the following judgment was delivered :—

Peacock C. J.—The Charter (Section 12) provides that " the Court in the exercise of its Ordinary Original Civil Jurisdiction, shall be empowered to receive, try, and determine suits of every description ; if in the case of suits for land or other immoveable property, such

land or property shall be situate, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit, shall dwell, or carry on business, or personally work for gain, within the local limits of the ordinary jurisdiction of the said High Court, except, that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or the value of the property sued for, does not exceed Rs. 100."

This Court, therefore, has jurisdiction in all cases (other than those for land or in which the debt or damage, or the value of the property sued for does not exceed Rs. 100) in which the cause of action has accrued within the local limits of its Ordinary Original Jurisdiction.

In this case the only question is where the cause of action accrued.

The learned Judge, who tried the case, was of opinion, that the whole cause of action against the defendant did not accrue within the limits, that is, that the cause of action did not accrue until after the death of Hollodhur Paul, when the defendant became his representative. The learned Judge says.—" No liability to suit here is transmitted to her, or necessarily accompanies the right of suit which the plaintiff may have against her on account of her husband's transactions." We are of opinion, however, that the cause of action upon which the defendant is sued is the cause of action which accrued against her husband. She is sued as his representative, or as standing in his place, and is liable only to the extent of the assets received from his estate. If the defendant had pleaded the Statute of Limitations, and had alleged that the cause of action did not accrue within six years next before the commencement of the suit, the period of limitation would have been computed, not from the date on which the defendant became the co-representative of the deceased, but from the date on which the cause of action accrued against him.

Under the old form of pleading it would have been sufficient to allege that Hollodhur Paul became indebted in his lifetime, that the debt remained unpaid, and the defendant was his representative.

The right to sue a representative upon a cause of action arising out of his own acts, is quite distinct from the right to sue a representative upon a cause of action arising out of the acts of the person for whom he is substituted. In the present case the defendant, as the representative of Hollodhur Paul, is sued upon a cause of action which accrued against Hollodhur Paul upon which he might have been sued, and in respect of which she, so far as his assets are concerned, is his representative. In other words she is sued instead of him. The cause of action is the same as that upon which he would have been sued if he had lived. It is not denied that the cause of action against Hollodhur Paul accrued within the local limits; and as no relief is sought against the defendant personally, we think the Court has jurisdiction over the defendant as the representative of Hollodhur Paul, as fully as it would have had over Hollodhur Paul, if he had been alive, and the action had been brought against him.

It would be very inconvenient in many cases if in respect of a cause of action which accrued against a deceased person in his lifetime, the representative of such deceased person could not be sued, except in the Court within whose jurisdiction he might be dwelling. If such were the law, if an agent employed to collect monies in Calcutta were to die without having paid over the monies collected, leaving all his assets in Calcutta, and a person as his representative residing in the Punjab,—it would be most inconvenient to bring a suit in the Punjab to recover the monies so collected in Calcutta, in which the only witnesses to prove the payments made to the deceased, would probably be persons residing here. It may be said that the witnesses might in such a case be examined under a commission, but that would not be so satisfactory as the examination of them *vivâ-voce.* But if the Court within which the defendant should reside should be within a hundred miles, commission could not issue, but the witnesses would have to attend personally, unless unable from sickness or infirmity to attend the Court. We think that the decree of the first Court ought to be reversed, but as the defendant did not take the objection to the jurisdiction the costs of appeal ought to be costs in the cause. The

case must be remanded to the first Court with directions to restore the suit to its original number, and proceed to investigate the merits of the case, and pass a decree therein.

Norman, J.—I entirely concur with the Chief Justice. The question whether an action can be maintained in this Court against the representative of a deceased person who does not reside within the jurisdiction, seems to me to depend upon whether the legal liability or promise which constitutes the cause of action, arose or was made in the lifetime of the deceased, and in Calcutta. If in Calcutta, and in the lifetime of the deceased, an action would lie in this Court against the representatives of the deceased, and in such case as the cause or right of action was a cause of action against the deceased, the representatives would only be liable to the extent of the assets. But if the action is brought on a promise or contract made by the executor, after the death of the testator, the action cannot be brought here, unless the executor's promise was made, or the liability arose within the jurisdiction, and in such latter case I may observe that, as a general rule, the executor's liability would be personal and absolute, the cause of action being one against himself, *Corner vs. Shew*, 3 Meeson and Welsby, 350.

RAMMANIK SHAW *vs.* SEEBRAM PANTOOL.

The proper course to be adopted by a third party desirous of setting aside an order of attachment, is not to proceed by motion, but to give notice of claim which can then be investigated as laid down in Sec. 246.

In the event of a claimant appearing for property attached, the Court will in its discretion postpone all other business, and give precedence to the hearing of the claim.

April 23, 1864. An application was made for an order to set aside an order attaching certain Bills of Lading under the following circumstances:—It appeared that one Rammanik Shaw sold a number of bags of rice to Seebram Pantool who shipped them on board two vessels in the river for conveyance to Bombay. The purchaser then entered into negociation with one Hadjee Sedick the party in behalf of

whom the present application was made, and obtained from him an advance upon the rice, depositing as security the mate's receipt, and the blank endorsed "Bills of Lading." Rammanik Shaw commenced an action against the purchaser, and obtained an order for attachment before judgment by a prohibitory order served on the agents of the ship forbidding them to part with the Bills of Lading. The Bills of Lading, which had been left with the agents, for the purpose of obtaining the Captain's signature, were accordingly detained, and Hadjee Sedick with whom they had been pledged now moved to set aside the order.

Cowie A. G., in support of the application, produced an affidavit setting forth the above facts, and moved for an order to set aside the prohibitory order which had been served upon the agents of the ship.

Woodroffe shewed cause against the application. The applicants proper course was to proceed by claim, and not by motion. Sec. 86 Act VIII. of 1859 laid down the course of procedure to be adopted when any claim was made to property which had been attached before judgment. The attachment had been made according to the nature of the property to be attached as prescribed in *sec.* 85. The Party should proceed under *sec.* 246 and not by motion.

Cowie A. G.—was heard in reply.

Levinge J.—said, he was of opinion that the order ought to be supported. The rice was on board ship, and the only feasible mode of stopping it was by attaching the Bills of Lading. In Act VIII. of 1859, Sec. 85, it was prescribed " that the attachment should be made according to the nature of the property attached, in the manner hereafter described, for the attachment of property in execution of a decree for money." *Sec.* 86 directs the investigation of claims preferred to property attached before judgment, to be proceeded with in the manner prescribed in a subsequent section of the Act for the investigation of claims to property attached in execution of a decree for money. The rules of attachment before judgment are by *sec.* 85 made the same as those subsequently laid down for the attachment of property in execution of a decree for money. The rules of attachment there referred

to are laid down in Secs. 233 to 239. In Sec. 234 it is enacted that "when the property shall consist of goods, chattels, or other moveable property, to which the defendant is entitled, subject to a lien or right of some other person to the immediate possession thereof, the attachment shall be made by a written order, prohibiting the person in possession from giving over the property to the defendant." The real title to this property was the Bill of Lading, and that document came within the meaning of the term chattel. He would not take upon himself to discharge the order, for he saw no other means of attaching the property on board ship after the ship had left. The right course for the applicant to adopt was to give notice of claim, which could then be investigated as laid down in Section 246.

Order discharged accordingly with costs.

The claim suit subsequently came on for hearing before Peterson J.

Peterson J.—said that this was a case of extreme hardship. The sum claimed by Rammanik Shaw was only Rs. 1,000, and Bills of Lading of property to the value of Rs. 4,000 had been attached. It did not appear that the defendant had been asked to furnish security as provided by the Act. The property moreover was not in the hands of the Defendant but of the claimant Hadjee Sedick. The effect of the attachment of these Bills of Lading might be, for any thing that was known to the contrary, that this Rice was rotting on the Shore at Bombay, and the plaintiff though he might gain his action might lose all the Rice. In every case in which attachment before judgment was applied for he would take care that every item of the Act was satisfied before the order was granted, and if any claimant should come in, he would take that case first and postpone all other business. In this case the decree must be for the claimant to whom the Bills of Lading must be delivered up, he undertaking to pay the whole of the surplus proceeds into Court after paying himself the amount due to him with costs, if costs cannot otherwise be recovered.

R. S. Rundle *vs.* The Secretary of State.

Sale of Waste Lands

Government Resolutions of Oct. 17, 1861.

Principal and Agent.—Extent of Authority.

Doyne and *Woodroffe* for the plaintiff.

The Advocate General and *Graham* for the defendant.

This was a suit for specific performance of a certain agreement alleged to have been made by the defendant. The Plaint set forth that in December 1861, the plaintiff applied to the Superintendent of Darjeeling for a grant of waste lands at Rinchington, in the Darjeeling District, under the Government Resolutions relating to the sale of waste lands, of the 17th October 1861. On the 31st day of December of the same year, five hundred acres of such land were allotted to him at Rinchington, at Rs. 2-8 per acre. On the 3rd of January following, the plaintiff paid to the Superintendent of Darjeeling the sum of Rs. 1,250, being the full amount of the purchase-money for the five hundred acres, and thereupon he was let into possession, in which he continued, and laid out money in bringing the land into cultivation. No deed of grant, however, had ever been executed in favour of the plaintiff, which he submitted ought to have been done. The plaintiff alleged, that in fraud of his rights to the land, the Secretary of State had, on the 3rd of December 1862, caused the lands to be advertised for sale, against which the plaintiff protested. Notwithstanding his protest, the land was put up to auction on the 4th May 1863, when the plaintiff, under protest to prevent the land from being sold to other parties, whereby he would have incurred considerable loss, bought it, as the highest bidder, at Rs. 20 per acre. The plaintiff sought to have this last sale declared void, and to restrain the defendant from proceeding to enforce the plaintiff to pay for the land at the rate of Rs. 20 per acre ; and further, to compel the defendant to execute a deed of grant in favour of the plaintiff. The case in the first instance came on for hearing before Mr. Justice Levinge who delivered the following judgment.

Jan. 20 and 21, 1864.

Levinge J.—The plaintiff sues for specific performance of a certain agreement made by the defendant under the following circumstances :—The plaintiff, on the 31st December 1861, applied to the Superintendent of Darjeeling for a grant of waste lands, at Rinchington, under the Government Resolutions of 17th October 1861. On the 31st of December 1861, 500 acres of uncleared land at Rinchington were allotted to the plaintiff, at Rs. 2-8 per acre. On the 3rd January 1862, plaintiff paid Rs. 1,250 to the Superintendent, in full, for the purchase of the land, and entered into possession, in which he has continued. He alleges that he has improved, and laid out large sums of money on the property, and that no deed of grant has been executed to him. The plaint avers that the defendant is, under the aforesaid Resolutions, bound to execute a grant to the plaintiff; that in fraud of plaintiff's rights, defendant caused the lands to be advertised for sale in the *Government Gazette* of 3rd of December 1862, and put up for auction on the 5th of January 1862, when plaintiff, under protest, and to save his property, bid Rs. 20 an acre, and being the highest bidder, was declared the purchaser. The plaint goes on to submit to the Court that such sale is void, by reason of the prior possession of title by the plaintiff, and prays that it be declared so, and that defendant be decreed to execute a conveyance to the plaintiff.

The defendant contends that the plaintiff's claim is founded upon dealings between himself, and an officer of Government, who had no authority to bind the defendant, or the Government of Bengal, in the matter, and that the plaintiff is therefore not entitled to any part of the relief which he asks. Such is the language of the 15th paragraph of defendant's written statement, and that is the substance of the defence.

It appears that the plaintiff carried on business with Herschell Dear in 1861. That Dear applied to the Superintendent of Darjeeling for a grant of 1,000 acres of waste land in that district—500 acres for himself, and 500 acres for the plaintiff; these being for disposal, as plaintiff says, under Resolutions of the Government of India of 17th October 1861. Dear, through his agent, Brine, made the

application to Dr. Campbell, the Superintendent, on the 7th November 1861, by letter of that date. The words of that letter are of importance; they are as follows :—"I beg leave to apply to you under the new rules for the sale of waste land—for 1,000 acres for Mr. Dear, and for 200 acres for myself—on the north-west slope of the Rinchington Spur, between the Balasun tea plantation, and the forest under the new cart road. (Signed.) F. Brine." No written reply has been given in evidence to the letter, nor does it appear that one was sent. However, it appears that Brine gave Dr. Campbell a rough sketch of the spur, and pointed out to him the exact locality of the 1,000 acres grant required. A letter has been produced, written by Dr. Campbell, dated the 8th December 1861, promising to meet Brine on the southern part of the land applied for, to examine the 1,000 acres. Brine states Campbell attended and gave possession. The evidence as to the actual giving of possession by Campbell is not very clear, but I can have no doubt that Brine had authority to, and did, take possession in December. Brine told Campbell he was anxious to take immediate possession, and asked him to pay the whole of the purchase-money at once, to which Campbell assented; but owing to the extent of the grant, neither party could well tell, whether the whole was cleared, or uncleared jungle. This is of importance, as construing a memorandum endorsed on Campbell's receipt for the purchase-money, which will be directly noticed. Some of the land had been apparently cleared in a very rough way by the Lepchars. Rs. 2,500, being at the rate of Rs. 2-8 an acre, was the price agreed on between Brine and Campbell, for the grant or allotment of 1,000 acres. This was done in accordance with the 29th Rule of the Government Resolution of the 17th October 1861, which provides that the price to be paid for unassessed land should not exceed Rs. 2-8 per acre for uncleared land, and Rs. 5 per acre for land unencumbered with jungle.

It is admitted, that, after the application was made to Dr. Campbell, it was registered, and on the 2nd January 1862, Brine wrote to Campbell the following letter :—"I beg to pay into your treasury, on account of Mr. H. Dear, Rs. 2,500 for the 1,000 acres of land he has applied for in Rinchington, under the new rules of 17th October last.

Mr. Dear desires me to say he wishes me to retain 500 acres of this land for himself, and to give 500 acres to Mr. Rundle; the title deeds to be made out accordingly, and the division of the land to be pointed out by me." This letter has been produced, and proved, and upon it Dr. Campbell has made two endorsements. The first is, "Attend to this." This memorandum is written opposite that portion of the letter containing Brine's instructions as to the preparation of the deeds, and is evidence to support plaintiff, that Campbell considered the contract complete, and all that remained to be ascertained, was, whether more than Rs. 2-8 an acre was to be paid. The second endorsement is as follows:—"Send receipt towards payment of one thousand acres." This was accordingly done, and a receipt was sent on the 3rd January—the next day. It is in these words:—"Received from Mr. Rundle the sum of Rs. 1,250 towards payment of 500 acres of land at Rinchington, Superintendent's office, Darjeeling, 3rd January 1862. (Signed) A. Campbell, Superintendent." It has been inferred in defendant's written statement, that this receipt, and the memorandum endorsed on the letter of 2nd January, are evidence that the contract is not complete; but I believe the memorandum was simply endorsed on the letter, and the receipt was so framed in case it should turn out that any of the land was cleared; for if it was, the price for so much as was unencumbered with jungle, was to be Rs. 5 an acre, and not Rs. 2-8. Mr. Wake, the present Superintendent of Darjeeling, has been examined at the hearing of the case, and has produced the books kept in the office at Darjeeling; and these show the entry made 3rd January 1862, of the Rs. 2,500 paid in by Brine for the value of 1,000 acres of land, at Rs. 2-8. This sum is split into two items of Rs. 1,250 each. Mr. Wake has also shown that these two sums have been carried over in the books to the credit of the Improvement Fund of the district, as all sums received for the sale of waste lands were, at that date, credited, with the sanction of the Government, to that fund. After the receipt was sent, it does not appear that Dr. Campbell ever visited the lands in question. He left Darjeeling for England the same month. Captain Murray succeeded him for a short time, and a letter of his has been produced at the hearing, dated 9th March, written to Brine,

in which Murray speaks of the land as actually allotted. In March 1862 Mr. Wake became, and has continued, Superintendent. Mr. Brine states he took possession of the waste land in January, appointed a chowkeydar to watch the timber, and made arrangements for a road to be made, which was to pass through the lower end of the spur. This arrangement was come to with Dr. Campbell, and the different allottees in that locality, and Dr. Campbell settled, that one half expense was to be borne by the proprietors, and the remaining half by the Government. This road has been made by the Balasun Tea Company, and the settlement as to the cost yet remains to be assessed. In March or April Mr. Brine ceased to be agent. Before the rains of 1862 some of the trees in the jungle were felled, and shingles put up ; and in the autumn the clearances began, and Tea was planted. Mr. Dear has been examined, and has proved that from 8 to 10,000 Rs. have been laid out by the plaintiff on the 500 acres, the subject matter of this action. Before I go to the consideration of the Government Resolutions, I shall very shortly refer to the action taken by the Government upon discovering the sale, made by Campbell to plaintiff. After the receipt to the dispatch of the Secretary of State regarding the sale of waste lands, dated the 9th July 1862, and in consequence of the instructions in that despatch, the Revenue Board set the local authorities upon enquiring, as to whether any allotments had been made under the Resolutions of 17th October 1861, and then it was discovered by the Government, that the allotment had been made to the plaintiff by Dr. Campbell as already detailed. There is no evidence to prove that this act of Dr. Campbell was ever sanctioned, or ratified by the authorities, but, as stated in the fourteenth paragraph of their written statement, the Government of Bengal offered the plaintiff to let him have the land at the minimum price of Rs. 10 per acre, for which he could have obtained it under the Rules of the 7th day of May 1859. The plaintiff declined this offer. After this proposal was refused the Government put up the lands for public sale by auction under the Resolutions of Oct. 17, 1861, when they were bought in by the plaintiff under protest, at the price of Rs. 20 an acre, as stated in the plaint ; and the present action has been brought to try the question between the plaintiff and the Government.

It should be noticed that, in point of fact, there does not appear to be any person who asserts or claims a title or interest in this land, save and except the plaintiff.

If Campbell had authority to bind the Government, the plaintiff will be entitled to all the relief he prays. My attention has not been called to the Rules of the 7th of May 1859, which the Government allege in their answer was the only authority under which Campbell could have sold ; nor have they been referred to at the hearing. But inasmuch, as I shall presently show the Government, to a certain and limited extent, admitted the acts of their subordinate officers to bind them in regard to the sale of waste lands under the Resolution of 17th October 1861, it was, I suppose, considered unnecessary by the Advocate General, to go into the consideration of the Collector's or Superintendent's powers under the Rules of May 1861. I have no doubt that at the time the Government Resolution of 17th October 1861 was issued, it was not contemplated by the Government that their subordinate officers would proceed at once, and without any futher instructions or authority than those contained within the four corners of the document, as published in the *Government Gazette,* to sell and dispose of the waste lands in their districts. The whole language of the Resolutions shows that more was to be done, before the local officers should have power to sell. In the first place, it appears to me, from the seventh paragraph, that these Resolutions were to be considered, and the matters that are therein directed to be done should be completed by the Government of Bengal, before the Resolutions could be acted on by the local authorities throughout that Presidency. The following is the language of the 7th paragraph :—" With these views, his Excellency in Council proceeds to state the Rules, under which he desires that the Governments, and Administrations of India, should give effect to these two measures." It can hardly be said, as observed by the Advocate General, that Dr. Campbell would come within, or under, the above description of " Governments and Administrations." But on reference to the 20th paragraph, I find that it is declared that " No reference to Revenue Boards, or other distant authorities, should be necessary, except in special cases of doubt. Rules of

procedure must be laid down by the local Governments with sufficient clearness of detail, to obviate in all ordinary cases, any necessity for reference or sanction." It is admitted, that when Dr. Campbell acted so hastily, no rules had been laid down, as directed by the local Government; and I should not hesitate to hold that Dr. Campbell had no authority to move in the matter, until after those rules, so imperatively required to be laid down, for his and other subordinate officers' guidance, had been promulgated by the local Government. But as will be seen presently, the Government, in all cases of sales under these Resolutions, have waived that breach of duty, or authority, in their subordinates.

Mr. Doyne, the plaintiff's counsel, has argued that Dr. Campbell was not bound to wait for the promulgation of those rules, and refers to the last clause of the 57th paragraph, which is in the following words :—" But it is not necessary to await the enactment of such a law before making known, and as far as practicable acting upon, the rules which have been here laid down." But it appears to me that this clause contains no authority, warranting Campbell to proceed to sell or bind the Government by any contract under the Resolutions ; for, on referring to the preceding words of the same paragraph (57), it will be seen that the law, the enactment of which it was declared unnecessary to wait for, was a law to give legal effect to the measures for the sale of waste land, so as to secure for all grantees a legislative title to their property," and has no reference whatsoever to the rules to be published by the local governments.

It is clear that the Governments are bound to any sale of waste lands, made under, and in pursuance of, the Resolutions of 17th October, and cannot avoid the sale, on the score that no rules had been promulgated, for, in addition to instructions to that effect contained in the Secretary of State's dispatch, dated the 9th July 1862, the Secretary to the Government of India, on the 15th August 1862, communicated to the Government of Bengal, the desirability that rules for regulating the sale of waste lands should be prepared with as little delay as possible, in conformity with the modified provisions then prescribed by her

Majesty's Government; but stated that it was to be observed, that all arrangements which had been already completed under the terms of the Resolution promulgated by the Government of India on the 17th October, in regard to the purchase of waste lands, were to be maintained; the new dispatch not being intended to have retrospective effect.

Although Campbell, at the time he entered into the contract with the plaintiff, had no authority to do so under the Resolutions of 17th October, the Government would be bound in consequence of those dispatches by the arrangement, provided that Campbell sold the land in question, under, and in compliance with, the terms of the Resolutions; but inasmuch as he has not done so, as I shall presently show, I am of opinion his contract is not binding. Treating this case as a contract entered into with the plaintiff, and Campbell as the agent of a third party, it must be conceded that if the agent sell the land in a manner not authorised by the authority given to him, the Government is not bound by the contract. Upon the law treating on this subject, I would refer to a passage in *Sugden on Vendors and Purchasers*, 14th Edn., p. 216 :—" If an agent, employed to sell an estate, sell it in a manner not authorised by the authority given to him, a specific performance will not be decreed against the principal, although the estate be sold for a greater price than he required for it. At least, if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority." This is a position peculiarly applicable to the present case. See the case of *Daniel* vs. *Adams*, Amb. 495., and *Helsham* vs. *Young* 1 Yo. and Col. *C. C.* 175, for authorities on the subject. It is to be remembered that the plaintiff's agent called on Campbell to sell him the land under the Resolutions of 17th October, and Mr. Brine has stated that he had read those Resolutions, and Mr. Dear has sworn that both he and the plaintiff, Rundle, had seen the Resolutions, prior to authorising Brine to apply to Campbell for the grant; so plaintiff and his agent were perfectly aware of the extent of authority vested in Dr. Campbell.

The Collector's or Superintendent's duty, after ascertaining by an inspection of the land registers, whether there is any other prior claim of property or occupancy in the land applied for, is clearly pointed out by the 17th paragraph of the Resolutions, that provides :—" When there is no such claim apparent from the Government records, and the Collector knows no other objection to the grant, he will advertise the application in the most customary and effectual manner, for a term which probably need rarely exceed thirty days." In the case before the Court there were no advertisements—nothing save a private arrangement between Campbell and Brine. The 18th Rule goes on to declare, " When, after the expiration of the term fixed, no such claim is preferred, or when, if preferred, it shall have been disposed of, the Collector will give to the applicant a document, testifying that the land, as described in his application, has been allotted him, subject to the terms hereinafter specified." It seems to me clear, from the language of that paragraph, that to advertise was a condition precedent, before the Superintendent had any authority to bind the Government, and he had to wait the expiration of the time fixed by the advertisement. The 29th paragraph has been referred to by both sides. This fixes the price to be paid as follows :—" The price to be paid for unassessed land should not exceed Rs. 2½ per acre for uncleared land, or Rs. 5 per acre for land unencumbered with jungle," and it may be said, " What injury has the Government sustained, as it has received Rs. 2-8 per acre, and no hostile claim has been preferred ?" But this is no answer in law to the defence pleaded—that the contract was made in a way wholly unauthorised by the authority given, and well known at the time by the plaintiff, who called on the agent to act under the Resolutions, which were clearly violated to the knowledge of plaintiff and the agent. The object of the 17th and 18th paragraphs is perfectly manifest. The first object is to guard the Government against a claim being put forward on behalf of another person after the contract entered into, as they might render themselves liable to legal proceedings for disposing of lands already possessed by some one else ; also to protect any one who might have a right of occupancy, and

whom it would be manifestly unjust to interfere with. Again, the public should be protected from private bargains, and a right of open competition should be respected. This appears' to be contemplated, inasmuch as the 30th Rule provides. " That in the event of more purchasers than one offering to buy the same tract, neither having any previous right to the land, it may be put up to auction at the upset price of an ordinary grant."—After the Government repudiated the contract the plaintiff seeks to enforce, the land was advertised ; and other purchasers demanding the land, it was advertised for sale ; and at the auction so much was the land in demand, that the plaintiff was forced to buy it in at the price of Rs. 20 an acre, being Rs. 17-8 in excess of the sum taken by Campbell, making a difference to the parties of Rs. 8,750 on 500 acres of waste land ; and I am quite at a loss to see why the Government are to be deprived of the market value of the land. There have been one or two other matters referred to by Mr. Doyne in argument, to which I must shortly allude. It has been pointed out that the rules published by the Government on the 30th August 1862, contain express directions to the Collector to publish advertisements ; but the 22nd Rule provides that " lands for the purchase of which application has been made under the Resolutions of the 17th October 1861, will, if such application were duly registered. be dealt with in accordance with the terms of the said Resolutions so far as the law allows." But I do not understand that direction to express an intention on the part of the Government, to waive a breach of the Resolutions that required advertisements to be issued before sale, and thus lay themselves open to litigation, and possibly work great injustice to existing rights ; and this view is supported by reference to the Circular Order of the Board of Revenue, dated the 30th August 1862. The Supplementary Rule, title letter Q., declares that " all proceedings taken in conformity with the Resolutions of 17th October 1861, will be recognised, and, pending proceedings, will be continued under the provisions of those Resolutions" showing that there was only an intention to be bound by proceedings, which were had in conformity with the Resolutions, an essential of which was advertisement. The next matter referred to was Mr. Dampier's letter to the Under Se-

cretary to the Government of Bengal, dated the 28th October 1862, in which it appears that the allotments made by Dr. Campbell had been brought to the notice of the Government by Mr. Wake, and directing advertisements to be issued at once in the case, and to proceed under Rule XXII. of the Government Notification of August 30, 1862. Mr. Wake's letter, dated 6th September 1862, admits that a positive assurance of a grant to the plaintiff had been made by Dr. Campbell; and of that matter, as I said before, I have no doubt. The Secretary to the Government, on the 2nd Dec. 1862, instructs the Board of Revenue, that the Government declined to make any exception, as regards the advertisements required by the 17th paragraph of the Resolutions of 17th October 1861, and, accordingly, after the matter had been brought before the Government on more occasions than one, the Government, in a communication, dated the 30th December 1862, declined to give up the rights, but made the offer already mentioned—viz., to allow those who had actually entered on the occupancy of lands for which they were registered applicants, to retain the lands on the term of their paying Rs. 10 an acre; and if the offer was not accepted, they were to be put up to auction.

Having therefore held that the plaintiff is not in a position to enforce specific performance of the contract sued on, I cannot hold him entitled in this action to any relief; nor do I consider he has any equity to ask it, as he was well aware of the terms of the Resolution under which he called on Dr. Campbell to act.

I have gone at considerable length into this case, and explained fully my reasons for holding that the suit must be dismissed, as I see from the record that there are several other similar claims awaiting the issue of this suit, which I now dismiss, and award to the defendant his costs on scale No. 2.

Against this case the Plaintiff appealed, and the case was re-argued before the Chief Justice and Mr. Justice Macpherson.

Doyne for the appellant.

Cowie (A. G. for the Respondent.

Norman C. J.—The plaint states that the plaintiff on or about the 31st Dec. 1861, applied to the Superintendent of Darjeeling for a grant of Waste Lands at Rinchington in the Darjeeling territory, under the Resolutions of Government of the 17th October 1861 : that about the said 31st of December 1861, 500 acres of uncleared land at Rinchington were allotted to him at Rs. 2, annas 8 per acre: that on or about the 3rd January 1862, the plaintiff paid to the Superintendent at Darjeeling Rs. 1,250, being in full for the purchase money of the said 500 acres, and thereupon the plaintiff entered into possession of the said 500 acres, and has continued in possession, and by cultivation greatly enhanced the value thereof: that no deed of grant has been executed to the plaintiff, who has all along been ready to receive the same, and now submits that the defendant ought to execute such a deed—but the defendant caused the land to be put up for a sale in January 1863, when the plaintiff was compelled to become the purchaser at Rupees 20 per acre. The plaintiff submits that the sale was void, and prays that it may be declared so, and that the defendant may be restrained by injunction from proceeding to enforce payment of the purchase money, and that he may be ordered to execute an instrument of grant in pursuance of the terms of the resolution of the 15th October 1861.

May. 18 1864.

The facts are as follows :—On the 17th October 1861 a Resolution was passed by His Excellency the Governor General of India in Council which was published in the *Government Gazette* of the 19th October 1861.

1. His Excellency the Governor General in Council has had under his consideration, the subject of the Despatches from the Right Honorable the Secretary of State, noted in the margin, with the opinions of the several local Governments, and of most of their principal officers on two important subjects.

No. 13 of 1st December 1858.
" 1 of 16th March 1859.

I. The sale of waste lands in perpetuity discharged from all prospective demand on account of land revenue.

II. Permission to redeem the existing land revenue by the immediate payment of one sum equal in value to the revenue redeemed.

2. His Excellency in Council finds that the ablest and most experienced public officers, very generally concur with private parties interested in the land, in the expectation that substantial advantages will follow the adoption of both these measures.

3. There is, however, much diversity of opinion as to the extent to which either measure is likely to operate, and as to the rules under which the acquisition of waste land in perpetuity, and the redemption of the land revenue should be allowed, some experience may be required to test fully the comparative soundness of the several opinions on these points, but His Excellency in Council sees no reason to doubt that, so far as either measure may take effect, it will be in every way beneficial.

4. As regards the sale of waste lands, there can be no question of the substantial benefits, both to India and to England, which must follow the establishment of settlers, who will introduce profitable and judicious cultivation into districts hitherto unreclaimed.

5. His Excellency in Council looks for the best results to the people of India, wherever in such districts European settlers may find a climate in which they can live and occupy themselves without detriment to their health, and whence they may direct such improvements as European capital, skill, and enterprize, can effect in the agriculture communications, and commerce of the surrounding country. He

confidently expects that harmony of interests between permanent European settlers, and the half civilized tribes, by whom most of these waste districts, or the country adjoining them are thinly peopled, will conduce to the material and moral improvement of large classes of the Queen's Indian subjects, which, for any such purposes, have long been felt by the Government, to be almost out of the reach of its ordinary agencies.

6. But it is the firm conviction of the Governor General in Council, that, in order to obtain permanently good results from such measures, it is indispensable, not only that no violence be done to the long existing rights, which sometimes in a rude, sometimes in a complicated form, are possessed by many of the humblest occupants of the soil in India, but that these rights be nowhere slighted, or even overlooked; scrupulous respect for them is one of the most solemn duties of the Government of India as well as its soundest policy, whatever may be the mode in which that Government may think fit to deal with rights of its own.

7. With these views His Excellency in Council proceeds to state the Rules under which he desires that the Governments and Administrations of India should give effect to these two measures.

8. As to the sale of unassessed waste lands, in which no right of proprietorship, or of exclusive occupancy, are known to exist at present, or to have existed in former times, and to be capable of revival.

9. In any case of application for such lands they shall be granted in perpetuity, under the rules which will be presently laid down, as a heritable and transferable property, subject to no enhancement of land revenue assessment.

10. All prospective land revenue will be redeemable at the grantee's option, by a payment in full when the grant is made, and the land granted will thenceforward be permanently free of all demands on account of land revenue.

11. The deed of grant shall be drawn up in English with a vernacular translation attached, the meaning of all doubtful cases being settled by the English test.

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16. The land registers of the Collector of land revenue, or of any other local officer exercising Collectors' powers, when properly kept and perfect, will often enable him to state at once, whether there is any other prior claim of property, or occupancy, on the land applied for.

17. When there is no such claim apparent from the Government Records, and the Collector knows no other objection to the grant, he will advertise the application in the most customary and effectual manner, for a term which probably need rarely exceed thirty days.

18. When after the expiration of the term fixed no such claim is preferred, or when, if preferred, it shall have been disposed of, the Collector will give to the applicant a document, testifying that the land as described in his application, has been allotted to him subject to the terms hereinafter specified.

19. If, after the allotment of the land under the preceding rule, any persons shall establish a right of property in the land so allotted, the possession of the party to whom the land has been granted *boná fide*, shall not be disturbed. But provided the claim be made within one year from the allotment, the claimant, on proof of his right, and on shewing good reasons why his claim was not advanced before the allotment took place, shall be entitled to receive from the Government full compensation for the actual value of his interest in such land. After the expiration of a year, all rights of third persons, which have not been already claimed, will be altogether barred, as well in regard to compensation as against the land, subject, in regard to compensation, to the same exceptions in case of persons under disability from infancy, lunacy, or other like causes, as are admitted by the existing law of limitation.

20. No reference to Revenue Boards or other distant authorities should be necessary, except in special cases of doubt. Rules of procedure must be laid down by the local Governments with sufficient

clearness of detail to obviate, in all ordinary cases, any necessity for reference or sanction.

Grants will, of course, be immediately reported to local Governments, and any departure from the rules of procedure should be promptly noticed by the Board of Revenue or other "Controlling Authority." But no confirmation should be required to complete grants made in accordance with the published rules of procedure; and such grants should not be liable to be disturbed on account of any informality, not attributable to any act or default of the grantee.

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29. The price to be paid for unassessed land should not exceed Rs. 2½ per acre for uncleared land, or Rs. 5 per acre for land unencumbered with jungle, subject to deduction of area for swamps, or unculturable land, as above stated. This limitation of rates shall remain in force for five years from the 1st of January 1862, subject to revision in the case of land which may be sold after that period.

30. In the event of more purchasers than one offering to buy the same tract, neither having any previous right to the land, it may be put up to auction at the upset price of an ordinary grant. But except in such cases, or in the case of suburban lots, recourse will not be had to sale by auction. The applicant will receive his land at a price fixed.

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55. Provisions will be made in any legal enactment which may be passed to give effect to this resolution, that the party named in the grant, whether of waste land, or of land on which the assessment has been redeemed, or his legal heir or representative, shall be regarded as the sole legal owner of the land, subject only in the latter case to claims other than those of Government, and to subtenures and subordinate rights of occupancy existing at the time of redemption, and that no transfer of property in it shall be recognized by our Courts of fiscal officers, unless duly registered.

56. With a view to secure the Government, and the public creditor against any loss of existing sources of Government income, provision will be made by law, that all sums paid in purchase of waste lands, or in redemption of land revenue, or in otherwise forestalling the land revenue, shall be paid to Commissioners, and periodically invested in such manner as the law may direct. The Commissioners will report annually to Government the total amount they have received, and invested, and the districts from which it has been received, and their reports will be published.

57. The local Governments will be called on to prepare the draft of a law, to give legal effect to these measures within their several jurisdictions, so as to secure for all grantees a legislative title to their property.

But it is not necessary to await the enactment of such a law before making known, and, as far as practicable, acting upon the rules which have been here laid down."

On the 7th of November 1861, Mr. Brine as Agent for Mr. H. Dear wrote to Dr. Campbell the Superintendent of Darjeeling as follows :—

"Sir,—I beg leave to apply to you, under the new Rules for the sale of waste lands, for 1,000 acres for H. Dear on the North-west slope of the Rinchington Spur, &c. This application was registered by the Superintendent of Darjeeling. It was then agreed between H. Dear and the plaintiff, that the grant of 1,000 acres should be divided equally between them. On the 2nd January 1862, Mr. Brine forwarded to Dr. Campbell, the Superintendent of Darjeeling, the sum of Rs.2,500 with the following letter:—

"Dear Sir,—I beg to pay into your treasury on account of Mr. H. Dear Rs. 2,500, for the 1,000 acres of land that he has applied for on Rinchington, under the new rules of the 17th October last. Mr. H. Dear desires me to say that he wishes to retain 500 acres for himself, and to give 500 acres to Mr. Rundle; title deeds to be made out accordingly, and the division of the land to be pointed out by me." Dr.

Campbell endorsed on the letter a memorandum "Send receipt towards payment of 1,000 acres" and sent a receipt to the plaintiff as follows—"Received from Mr. Rundle the sum of Rs. 1,250 towards payment of 500 acres of land on Rinchington. Superintendent's office, Darjeeling January 3, 1863. Signed. A Campbell, Superintendent." At the time of granting this receipt, it was uncertain whether the land was cleared, or uncleared. It was not proved that the application of Mr. Dear or the plaintiff was ever advertised as required by the 17th Section of the Rules of October 17th 1851, or that anything in the shape of an allotment beyond what has been above stated ever took place. It has been proved, however, that by the authority of Dr. Campbell the plaintiff's agent, Brine, took possession of the land cleared, and expended considerable sums of money upon it in January 1863. The sum of Rs. 1,250 paid to Dr. Campbell was at first carried to the account of the local fund for improvement of the station, as other sums received for the sale of waste lands at Darjeeling were at that date. The account of the monies received should have been sent to the Government in May 1862, but was not in fact so sent until November. Part of the land had been previously cleared in a very rough way by the Lepchas: they were in occupation of the land when Brine applied for it. Brine swore that they were ryots of the Soobah who held, under a lease from Dr. Campbell, some 25,000 acres, at a rental of Rs. 25 a year; he said the Lepchas had only a right to the land as long as the crops were standing on it, they were mere squatters, the Soobah's lease had expired; it was renewed from year to year till some applicant for the land came forward. No one since that time has set up any claim to the land. Brine further said "if it turned out that any part was cleared, I believe I should have had to pay the difference between Rs. 2-8 and Rs. 5."

On the 15th of August 1862, a despatch from the Secretary of State on the subject of the Resolutions of the 17th October 1861, together with circular instructions issued to the Government of Bengal, the North Western Provinces, and the Punjab, were published in the *Gazette* for general information. In the ninth paragraph of this despatch the Secretary of State says. "Her Majesty's Government can-

not approve of the proposal to give an uniform price for all unassessed and uncleared land throughout India, without reference to the locality or situation, and I have to request that your Excellency in Council will immediately take measures, for withdrawing the offer made in paragraph 29 of the Resolutions." In the 76th paragraph he says "Your Excellency in Council will understand, that the instructions contained in this despatch, supersede at once the provisions of the Resolution of the 17th October 1861, so far as they are inconsistent with them, and that fresh regulations must be prepared, and submitted for the approval of Her Majesty's Government. It is not, however, intended that these orders should have retrospective effect; and if any arrangements in regard to the purchase of waste lands, have been actually completed under the provisions of the resolutions, they must, so far as is compatible with the law, be scrupulously carried into effect." In the circular instructions abovementioned, para: 2, it is said, that "It will be observed that all arrangements which have been already completed, under the terms of the Resolution promulgated by the Government of India last October, in regard either to the purchase of waste lands, or the redemption of land revenue, are to be maintained, the present despatch not being intended to have retrospective effect." By the rules for the sale of waste land published by the Government of Bengal, Rule 22, it was declared that "lands, for the purchase of which applications have been made under Resolution of the 17th October 1861, will, if such application were duly registered, be dealt with in accordance with the terms of the Resolution so far as the law allows."

By a supplementary rule contained in a circular order of the Board of Revenue, dated the 14th of October 1862, rule O, it was declared that "all proceedings taken in conformity with the Resolution of the 17th October 1861, will be recognized, and, pending proceedings will be continued under the provisions of that Resolution. When the application has only been made and registered, the next step will be the issue of the advertisement required by paragraph 17 of the Resolution; if the advertisement have already been issued, and the time is expired, the Collector will proceed to give applicant a certificate of

allotment under paragraph 18, unless others have come forward with offers to purchase the land; in which case the lot must be put up to auction under paragraph 30 of the Resolution. Until the 30th of August 1862, no instructions had been given to the Collectors, and other officers in Bengal to enter into contracts for the sale of waste lands under the Resolution of the 17th October 1861. It was admitted by the Government, that for all purposes connected with the grant of waste lands under the existing waste land rules, and under previous rules for the grant of waste lands, the powers of the Superintendent of Darjeeling are, and always have been, those of a Collector in Regulation Districts. It is not shewn that any objection was made to the title of the plaintiff by the Government of India until the 3rd December 1862, about which time the Government published an advertisement relating to the 500 acres of land applied for by the plaintiff, which is as follows :—

"Notice is hereby given that the following lots of waste land, &c., names of original applicants as below, have been applied for under the Governor General's Resolution of the 17th October 1861, and in accordance with Rule 22, and supplementary Rule O. annexed to the Board of Revenue's Circular Order No. 63, dated the 14th of October 1862, the lots will be sold by auction &c., to the highest bidder above the upset price of Rs. 2-8 per acre, should any other application for the land be made before the date, otherwise each lot will be assigned to the first applicant at the said upset price."

On the 3rd January 1863 the plaintiff under protest, and to save his property from being sacrificed, bid Rs. 20 per acre, and was declared the purchaser.

Statute 22 and 23 Vic. Chap 41 was referred to, as shewing the power of the Governor General in Council, to dispose of waste lands in India. The learned Judge points out that it was not contemplated at the time when the Government Resolutions of the 17th of October 1861 were passed, that subordinate officers would proceed at once, and without any further instructions, or authority, than those contained

in that Resolution, to sell and dispose of the waste lands in their district, and that the whole language of the Resolution shews, that it was contemplated that more was to be done, before the local officers should have power to sell. He refers to paragraphs 7, 20, and 57, and adds "I should not hesitate to hold that Dr. Campbell had no authority to move until after the rule, so imperatively required for his and other subordinate officers' guidance, had been promulgated by the local Government. But the Government have waived that breach of duty in their subordinate." He says "It is clear that the Government are bound by any sale of waste lands made under, and in pursuance of the Resolution of the 17th of October, and cannot avoid the sale on the score that no new rule had been promulgated, for in addition to instructions to that effect, contained in the Secretary of State's despatch of the 9th of July 1862, the Secretary to the Government of India, on the 15th of August 1862, communicated to the Government of Bengal, the desirability that rules should be prepared, and observed that all arrangements, which had already been completed under the terms of the Resolution, were to be maintained, the new despatch not being intended to have a retrospective effect. The learned judge then proceeds to say that the Government would be bound, if Dr. Campbell had sold the land in question in compliance with the terms of the Resolution of the 17th of October.. He proceeds to shew that he did not do so, and therefore dismisses the suit. I concur entirely with the learned judge in thinking that under the Resolution of 1861, Dr. Campbell had no power to make a valid and binding allotment in favor of any purchaser, without having first advertised the application, in pursuance of the terms of Section 17. He was an agent with a special and limited authority, the extent of which was, as appears by the evidence, perfectly well known to the plaintiff, and his agent Brine. Under such circumstances, if the plaintiff seeks to bind the Government as the principal, by the act of its officer, it is incumbent on him to shew that the authority has been strictly pursued.

The case falls within the general principles stated in *Story on Agency* S. S. 126, 165, 224 Sugdens Vendors p. 181, 13th Ed. In the case of the *Collector of Mussaleepatam* vs. *Cavala Vencata*

Narrainapah, 8 Moores Indian Appeals 519, Lord Justice Turner, in delivering the judgment of the judicial committee of the Privy Council, says "The acts of a Government officer bind the Government only, when he is acting in discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact, or in law, directly, or by implication ratifies the excess.". The plaintiff knew that an allotment without the advertisement which was intended for the protection, not only of the rights of persons having any apparent title of occupancy,but of the Government, against future claims by parties alleging such rights, was wholly beyond the power of Dr. Campbell, and if the question turned on the present right of the plaintiff to a grant without the publication of any advertisement, the suit must have failed.

Mr. Doyne argued that, in the absence of all proof on either side, it must be taken that Dr. Campbell did his duty, and that it must be assumed that an advertisement was duly issued. There might have been a foundation for that argument, if Dr. Campbell had granted to the plaintiff a formal certificate under Section 18 of the Rules. He did nothing of the sort. He let the plaintiff into possession on payment of the sum on account of purchase money. But that may have been, and, in fact, was done under the provisions of Section 25, which certainly does not provide, that the Collector shall not in any case let the applicant into possession, until after the publication of the advertisement. There are therefore no facts in this case to which the Court could apply the maxim that "All things done must be presumed to have been done according to law" to the prejudice of the Government on this point. I observe too the plaintiff does not allege the publication of such advertisement, or any facts from which the defendant would be warned, that it was contemplated to make such a case against him.

I find, however, that in the 22nd Section of the Rules published by the Government of Bengal, which explain and carry out the terms of the despatch of the Secretary of State, and the instructions to the Government of Bengal from the Government of India, to the effect that the letter of the Secretary of State was not intended to have a retros-

pective effect, it is provided that " Lands for the purchase of which application has been made under the Resolution of 17th October 1861, will, if such application was duly registered, be dealt with in accordance with the terms of the said Resolution, so far as the law allows." And the Board of Revenue, laying down rules as to how this Resolution of the Government is to be carried into effect, say in supplementary rule O " When the application has only been made and registered, the next step will be the issue of the advertisement required by paragraph 17 of the Resolution. The plaintiff must be treated not as a person who has obtained an allotment under Section 18 of the Resolutions of the 17th of October 1861, but simply as a person who had made, and duly registered an application under the Resolutions,for an allotment of land to which there is no claim apparent from the Government records.

Now Section 17 provides that in such cases the Collector is " to advertise the application in the most customary and effectual manner for a term which probably need rarely exceed thirty days." The advertisement contemplated by that Section appears to be simply an advertisement of the application, in other words a public notice that the applicant is desirous of obtaining an allotment of the land, inviting all parties alleging themselves to be interested in the land, to bring forward their claims. Sections 16 and 17 shew what was the object of, and Section 18 what was to follow upon, the publication of the advertisement. Looking at these sections, as well as at the general scope of theResolutions, I am confirmed in the opinion that the advertisement was only meant to enable the officer conducting the sale " to watch with scrupulous care, that in allotting lands as waste to a stranger, those long existing rights, which sometimes in a rude, and sometimes in a complicated form, are possessed by many of the humblest occupants of the soil in India, should in no wise be slighted or overlooked." see Section 6.

The great object of the Government as expressed in the Resolutions of the 17th October 1861, was that by selling lands at a low price, European settlers might be led to introduce profitable and judicious cultivation into tracts till then unreclaimed—Section 14. For that purpose the price was not exceed 2-8 per acre, for uncleared land

Section 29, and by Section 30, except in case of several applicants claiming to purchase the same tract, or in case of suburban lots, recourse was not to be had to a sale by auction, but the applicant was to receive his land at a price fixed. High prices and competition were not the end which the Government proposed to itself. It may be said that the 30th Section gave the Government the option of putting up the land at auction, if more purchasers than one offered to buy the land, at any time before the completion of the allotment, and that the Government, by the circular order of the Board of Revenue of the 14th of October 1862, supplementary rule, declared their intention of exercising that option, by selling by auction in all cases where more purchasers than one should offer. The reasons why 30th Section gave this option to the Collectors, and other Government officers, may have, been, that the power so given was intended to be exercised chiefly in cases where the officers could not determine, which of two applicants had the better, more equitable, and fairer right to ask for an allotment, not that if one man had discovered, made a road to, or gone to the expense of surveying a valuable allotment of land or minerals—another, with no claim beyond that he had seen what his more enterprising neighbours had done, should come in, and complete with him for the property on equal terms at a sale by auction. Be that as it may—without in any manner questioning the propriety of the exercise of a power, which by Section 30 is undoubtedly reserved to the officers of Government, I think it clear that the circular order of the Sudder Board of Revenue Rule O, does not warrant the issue of an advertisement inviting competition such as that in the present case. It is impossible to say that the insertion of such a notice may not have had an effect, and indeed a very great effect, in inducing persons to come forward as purchasers, who might not otherwise have been willing to interfere with the competition, or the purchase, by a person in treaty with the Government under the terms of the Resolution.

The plaintiff contracted on the faith of the 18th Section which told him that, when on the expiration of the term fixed by the advertisement, no claim of property or occupancy of the land applied for is preferred, or when, if preferred, it should have been disposed of, the Col-

lector would give him a documentary testimony that the land, as described in his application, had been allotted to him subject to the terms thereinafter specified.

Surely then it was not dealing with the plaintiff in accordance with the spirit or the terms of this clause, to advertise that the lands, for which he has registered an application, should " be sold by auction on the fourth of January to the highest bidder above the upset price of Rs. 2-8 per acre, should any other applications for the land be made. before that date." This was not an advertisement warning all persons claiming any interest in the land, to come in, and state their claims, lest that should be disposed of, in order to protect the applicant from being subsequently harassed by assertions of title on the part of such claimants. and to protect the interests of any persons in actual occupation of, or having claims to, or any rights in the soil, which was the advertisement contemplated by the 17th Section, but a very different thing *viz.* an advertisement addressed exclusively to intending purchasers of land, inviting them to come in, and complete for the land. It was addressed to a different class of persons, and its effect, as well as its object, must have been entirely different from anything, which was contemplated by the advertisement prescribed by sec. 17.

It is well settled that when property is advertised by the owner to be sold " without reserve" the Courts will not allow any interference direct, or indirect, which could under any possible circumstances affect the right of the highest bidder at a sale, whatever may be the amount of his bidding, to be declared the purchaser, *Warlow* vs. *Harrison* 29 L. J. Q. B. 14. At law if the owner of an estate put up for sale by auction, employ puffers to bid for him without declaring his intention, the highest bidder will not be compelled to complete his purchase, *Thornet* vs. *Haines* 15 M and W. 367. *Howard* vs. *Castle* 6 Term Reports 642. In another case this rule was applied to the case of a sale under an extent by an agent of the owner, to whom a bidding was reserved by the conditions of sale. In equity, if the purchaser has, in consequence of the employment of the puffer, been induced to give more than he would otherwise have done, he can avoid

the sale, *Bramely* v. *Alt* 3 Ves 620. These cases shew how strictly the Courts both of law, and equity, will hold a seller, not only to the letter, but to the spirit of the offer to sell.

I think that the principles established by those cases apply to that now before the Court :—that in conducting the sale as they have done, the Government has not dealt with the plaintiff in accordance with the terms of the Resolutions of the 17th of October 1851, and has therefore broken the contract made by Dr. Campbell as then agent. and adopted expressly by the Government : that the Plaintiff ought not to be bound by the sale which has taken place. I therefore would reverse the judgment of the Court below, and declare that such sale ought not to be inforced as against the plaintiff : that it must be set aside, and the defendant restrained by injunction from proceeding to enforce the payment of the said price of Rs. 20 per acre.

Macpherson J.—I do not concur with the learned Chief Justice in so much of his judgment as relates to the advertisement of December 1862 and its consequences.

By that advertisement the Government notified that the lands in the possession of the Appellant had been applied for by him under the Resolution of the 17th October 1861, and would "in accordance with rule 22, and supplemental rule O annexed to the Board of Revenue's Circular Order, dated the 14th October 1862, be sold by auction, to the highest bidder above the upset price of 2-8." And in the advertisement it was also stated that any other application for the lands should be made before the date fixed for the sale, "otherwisé each lot will be assigned to the first applicant at the upset price."

It appears to me that there is nothing in this advertisement, which constitutes a departure on the part of the Respondent from the terms of the rules, under which the advertisement professed to be issued. The question turns upon the construction to be put on certain paragraphs of the Resolution of October 17th 1861, and on the 22nd of the rules of the 30th August 1862, and the supplemental rule O of the Revenue Board's circular. The latter two rules are as follows :—

"Rule 22. Lands for the purchase of which application has been made under the Resolution of the 17th October 1861, will, if such application were duly registered, be dealt with in accordance with the terms of the said Resolution so far as the Law allows."

"Rule O. All proceedings taken in conformity with the Resolution of the 17th October 1861 will be recognised, and pending proceedings will be continued, under the provisions of that Resolution. Where the application has only been made and registered, the next step will be the issue of the advertisement required by para. 17 of the Resolution If the advertisement has already been issued, and the term of it have expired, the Collector will proceed to give the applicant a certificate of allotment under para. 18, unless others have come forward with offers to purchase the land, in which case the lot must be put to auction under para. 30 of the Resolution. In all such cases the sales will be regulated by the Rules laid down in the present notification."

Of the Resolutions of the 17th October 1861,—the 16th para. says "That the land register will often enable the local officers to state at once, whether there is any other prior claim of property, or occupancy, of the land applied for."

Para. 17 lays down "That where there is no such claim apparent, and no objection is known, the local officer will advertise the application in the most customary and effectual manner, for a term which probably will rarely exceed 30 days."

Para. 18 provides "That when after the expiration of the terms fixed, no such claim is preferred, or where if preferred, it shall have been disposed of, the Collector will give the applicant a document testifying that the land has been allotted to him."

Para. 30 is as follows :—"In the event of more purchasers than one offering to buy the same tract, neither having any previous right to the land, it may be put up to auction at the upset price of an ordinary grant. But except in such cases, or in the case of suburban lots,

recourse will not be had to sale by auction : the applicant will receive his land at a price fixed."

I do not doubt that the general scope of the Resolution of October 1861 was, that the first applicant should usually get the land he applied for, at a fixed price, and that sales by auction, and competition among applicants, were to be the exception. Nevertheless it appears to me that, in any case in which more purchasers than one offered to buy, the Government had the option of selling the land by auction. It is urged that para. 30 is meant to apply only to the case of two or more simultaneous applications, or to the case of several applications made about the sametime, where it may appear to the government officers that an applicant, other than the first, has some strong claim to the land, which in common fairness ought to let him in to complete with the other applicants. But I see nothing to justify me in putting so limited and narrow a construction upon para. 30. That paragraph does not require the offers to buy to be simultaneous. The words are "In the event of more purchasers than one offering to buy the same tract, neither having any previous right to the land, it may be put up to auction and &c."—So that if any purchaser, a any time before the expiration of the thirty days, or other time for which the land was advertised, came forward and offered to buy, that gave Government the right to sell the lands by auction. I read para. 30 of the Resolution as giving Government a discretion to be exercised in any special case, in which it seemed proper to sell by auction, any lands for which an offer was made while the advertisement was still running. This reading of para. 30 may be said to be inconsistent with language of para. 18. The two paragraphs, when taken separately, may perhaps not be literally reconcilable with each other. But the inconsistency is removed by reading para. 18 along with para. 30.

It cannot be questioned that under para. 30 any suburban lots may; when applied for, be put up for sale by auction : and the language, which necessarily leads to this conclusion, is exactly as inconsistent with the literal terms of para. 18, as is the language, which, when construed

as I think it ought to be construed, leads to the conclusion that the Government Officers had a discretionary power of selling by auction any lands, for which more purchasers than one made offers, before the expiry of the period of the advertisement.

Again it is said, that, even supposing that the Government might in this present instance have sold the lands by auction, if they had been properly advertised, and more purchasers than one had made offers to buy, still the Government had no right to ask purchasers to come forward, and the advertisement, and the sale which followed upon it are vitiated, because the advertisement invited competition. But it seems to me that the only question is, whether the advertisement can be deemed to be an advertisement within the meaning of para. 17. I think that it can. No doubt in the ordinary case of lands which the Government had no intention of selling by auction, the sole object of advertising would be to give notice to claimants, and to bring them forward.

But holding as I do that the government officers had, according to the Rules, a legal right to sell by auction any lands for which more purchasers than one made offers, I know of nothing which prohibited them from intimating in the notice to claimants, that the lands were lands which they were prepared to sell by auction, should several purchasers offer. The advertisement issued in this case gave full notice to claimants of the fact that the lands had been applied for,— and it, therefore, was the advertisement required by para. 17 of the Resolution, see Rule O. And I think that it was none the less the advertisement required by para. 17 of the Resolution, because it also stated that the lands would be put up to auction, if several purchasers offered. On the whole, I am of opinion, that the sale complained of was legally and properly made, and that there is nothing in the manner in which it was conducted, which entitles the appellant to any relief.

It is to be remarked that the objection now raised to the form of the advertisement of December 1862, does not seem to have cons-

tituted any part of the appellant's original case. Moreover it is not a point taken in the written grounds of appeal filed in the cause, nor in the argument of the appeal was it more than cursorily touched on by Mr. Doyne. Throughout, in appeal as well as before Mr. Justice Levinge the appellant's case has been, that his contract had been sp far completed, that the Government was bound to perfect his title and give him a deed of grant, and that the Government was under no possible circumstances entitled to sell by auction the lands he had applied for. Had my opinion as to the advertisement of 1862 been other than it is, I should have had some hesitation in holding that in this suit, and at the present stage of the proceedings, the appellant was under the circumstances entitled to relief. The from of the advertisement of December 1863 has not in truth ever been one of the issues in the cause. Had it been so originally, it may be that other evidence might have been produced, which would have had a material bearing upon the question.

Further, it has been ruled that when there is a doubt as to the legal title or right of a person, claiming an injunction in aid of that title or right, the Courts will not grant the injunctions prayed for, until the legal title or right has been established by proceedings at law. See *Bramwell* vs. *Halcomb* 3 My and Cr 737. *Mayor of Cardiff* vs. *Cardiff Waterworks Company* 4 De G. and J. 596. Now in this case the legal title set up by the appellant has been actually tried and found, both by this Court and by the lower Court, to be invalid. It therefore seems to me that coming into Court as he does in this suit to enforce an invalid title, the appellant is not in a position now to ask for any injunction in aid of that title. He bases his right to restrain the Respondent from proceeding to enforce the auction sale, on the validity of his title derived from the contract made with Campbell.

This Court finding that title to be invalid, cannot in my opinion, give him relief in this suit on the alleged invalidity of the respondents rights as vendors under a subsequent sale, before any attempt has been made to enforce payment of the purchase money under that lease.

Except so far as appears from the remarks I have now made as concur substantially in the Judgment of the Chief Justice.

The practical effect of my Judgment is that the decree of Mr. Justice Levinge will be confirmed.

I have felt myself compelled to come to a conclusion at variance with the opinion of the learned Chief Justice. But I regret the consequences of my dissent the less, when I consider that from the decree, which, had I concurred would now have been made, the appellant would reap only such qualified benefit as he might derive from having the sale of January 1863 cancelled, and the lands advertised anew under para. 17.

It might very possibly have happened that, if the lands were again advertised, the final position of the appellant would have been somewhat worse than it at present.

Norman C. J.—There being a difference of opinion in a point of law, viz. whether the advertisement of the 27th of November 1862 was such an advertisement as is required by paragraph 17 of the Rules of 1861, and whether, supposing it not to be so, the publication of this advertisement was a breach of the engagement of the Government with the plaintiff entitling him to an injunction restraining the Government from enforcing the sale, acting under the authority of Sec. 23 of Act XXIII. of 1861, we called in Mr. Justice Morgan, in order that the case might be reargued before him, sitting with us on that point. The Advocate General took a preliminary objection that, by Rule 8 of the Rules of the 1st of January 1861 "Appeals from the decision of one Judge, shall be heard and determined by at least two other Judges, and in case the two other Judges who exercise the Appellate Jurisdiction differ in opinion, the decision shall be affirmed."

We are all agreed that it was competent to the Court to make this rule under section 13 of the 23 and 24 Vic. Cap. 104. I should have been prepared to hold, that in case of difference of opinion on a

point of law, the rule contemplated the case of the agreement of one Judge in the Court of first instance, and one in the Appellate Court to the same proposition, but that this present case, in which the point on which we differ was not directly adjudicated upon by the learned Judge in the first Court, is not within the reason or spirit of the rule, and should be dealt with under Act XXIII. of 1861, Sec. 23, As however, my learned brother holds, that the rule governs the case which undoubtedly falls within the strict language of it, the Judgment of the Court below will be affirmed, and we think that the costs must follow the ordinary rule.

The People's Bank *vs.* Obbard.

A sends a Hoondee by Post to a Bank. The Bank presents it for payment by one of its servants B, who brings it back, reporting that payment had been refused. The manager of the Bank with the intention of returning it to A, places it in an envelope sealed and stamped, which is laid upon the table ready for the post, it being the custom of the Bank to post all letters in that manner. The Hoondee does not reach A, and it afterwards appears that B presented it for payment the following day and obtained cash for it. Held that the Bank was guilty of such neglect as to render it liable to A for the amount of the Hoondee.

Eglinton and *Cowell* for the Plaintiff.
Graham and *Woodroffe* for the Defendant.

This suit was brought to recover a sum of money said to be due to the Plaintiffs on an overdrawn account. The Defendant pleaded a set off of 800 Rs., and the case turned upon the question, whether the Bank or the Defendant were to be held liable for the amount of a Hoondee under the following circumstances. It appeared that Major Obbard sent a letter (unregistered) to the Bank containing the Hoondee. The Hoondee reached the Bank Dec. 29, and was presented for payment on that day, by a man named Chowburga, one of the servants of the Bank. Payment was refused, the note not being due, and Chowburga brought it back saying it would be paid Jan. 7. On Jan. 7, he took it again, and brought it back without having presented it, saying payment had been again refused. The manager thereupon erased the Bank Receipt, and put it in an envelope ready for posting. Chowburga abstracted it, stamped it again with the Bank Receipt, and having cashed it on the 8th—one day after it became due—appropriated the money to his own use. The question was whether the Bank or Major Obbard ought to bear the loss. Jan. 8, 1864.

Levinge J.—This case resolves itself into the issue raised on the pleadings, whether the Bank or Major Obbard is to suffer the loss of the 800 Rupees on the Hoondee. If Major Obbard is to suffer,

the action is sustainable, there being in that case a balance due to the Bank on an overdrawn account. I shall first revert to the argument of Mr. Eglinton that Major Obbard should sue the acceptor. The acceptor has sworn he paid the Hoondee. I am satisfied, he paid 800 Rupees on the 8th of January. If it were necessary to decide the point I should hold that that payment was a good discharge to Ramsoroop, but he is no party to this action, and could only be sued on the ground that he has not discharged himself, because he did not use due caution, which could only be made out in the way Mr. Eglinton argued. He says presentation on 8th was a circumstance to put the acceptor on his guard, and he should have gone to the Bank. I cannot agree in that, and do not see such laches as to fix Ramsoroop on his acceptance. There was no such delay as to cause suspicion in the mind of the acceptor, for he paid the amount due on the Hoondee the very day after it fell due. The third day of grace expired on the 7th, and the Bill was presented on the 8th, and paid. The great point made against Ramsoroop is, the fact of Wilkinson's receipt having been erased, and it would be a question for a jury, if the case was submitted to one on an action against the acceptor, whether he had not shown want of caution in paying the Hoondee to the holder with Mr. Wilkinson's receipt erased on the note; but looking at the peculiar circumstances of this case, I am inclined to think it would be impossible to fix Ramsoroop with any liability on this paid acceptance, On the 29th December the Hoondee was presented with the receipt, but being presented so long before it was due, the acceptor may not have had his attention called to the receipt, and it is not proved that the note was presented to Ramsoroop on 7th January. I do not believe it was, I believe all Mr. Wilkinson has said. He believed he sent it on 7th January and he can only speak from belief. Chowburga, I am certain, never presented it on the 7th, and Ramsoroop swears it was not so presented. I hold secondary evidence of the contents of the letter of the 7th January cannot be given in evidence. The fact of a letter having been written to Major Obbard by Wilkinson is clear, and we have Mr. Wilkinson's evidence that he gave the note to Chowburga who brought it back on the same day. Mr. Wilkinson was apprised by Chowburga that the Hoondee would be paid next

day, and this fact, to say the least, should have made Wilkinson careful what he did with so valuable a document. I am convinced Mr. Wilkinson put the Hoondee into a sealed envelope on the 7th. I am equally convinced that that note was not presented on the 7th. The Banker Ramsoroop swears it was not presented till the 8th. Is there any reason to disbelieve the Banker? He paid in hard cash on the 8th, and was not in insolvent circumstances. I am firmly convinced Chowburga committed a fraud, and could not escape conviction. I believe he came to Wilkinson on the 7th, and said the Cooteo would not pay till the following day. That was a falsehood; and coupled with the abstraction of the note, and payment on the 8th, and part of the proceeds traced to the Bank, there is no doubt in my mind, that Chowburga has committed a fraud. Although Ramsoroop has failed to identify Chowburga, he has only said he does not know the person who presented the Hoondee. The Hoondee was presented on the 8th with the Bank stamped receipt uncancelled by the Bank servant (who is sworn to have gone to the Cotee before), one day after due date. The note is in the native character, and the cancelled receipt in Wilkinson's name is in English, and Ramsoroop does not read English. I cannot see how any Court could hold the Cotee liable to pay twice over.

Is the Bank liable to make good to Major Obbard the amount realized under this Hoondee by reason of its negligence. The Bank can only be fixed with liability if it has been guilty of neglect. Hilyard on Torts Vol. II. page 352, 2nd Edn. 1861. It is there laid down that when a bill or note is forwarded to a Bank which receives and undertakes to collect it, the Bank is liable without special agreement for any default of the agents or correspondents it employs in collecting, or paying over the proceeds. That is an authority to show that a Bank like any other bailee is liable in point of law for loss when caused by neglect. The Hoondee was sent to the Bank in the letter of the 23rd December, and reached the establishment on 29th December. The Bank writes on 29th December. Up to that moment the Bank did every thing to avoid being fixed with liability: they say "on realization we will place it to credit." It would appear that directly after writing that letter the note was sent on

the same day for payment, and had affixed to it the receipt afterwards erased. Wilkinson believing it to be payable on presentation put his receipt on it. The note was brought back accepted, and Chowburga had evidently been told when the note would be payable. After the note was brought back the memo. at foot of the letter of the 29th December to Major Obbard was written. Nothing was done till the 7th January : Mr. Wilkinson has sworn that he had the custody of the note in the interval, and on 7th he handed it to Chowburga in the state it was in on the 29th. I believe that note was never presented on the 7th, but it was handed back to Mr. Wilkinson on the 7th by Chowburga, with the statement "it will not be paid to-day but to-morrow." Mr. Wilkinson has stated he was justified in forwarding it to Obbard. After a note has been dishonored a Bank should return it. Mr. Wilkinson however was acting only on the statement of Chowburga whom he chose to believe. Mr. Wilkinson says he sent back the note in a letter. It was never sent back to Obbard though an attempt was made to send it.

One question is was Wilkinson bound to send it in a registered letter? There is no proof it came in a registered letter, and Mr. Wilkinson has said it is not customary with that Bank to register dishonored notes when returned, and it is not proved that the document came in a registered letter. My opinion is there is no neglect in sending it by post and by an unregistered letter. There is a case to show that the loss should fall on Obbard if that had been the only neglect on the part of the Bank. In *Byles on Bills* last Ed. page 534 it is laid down that where a debtor remits a bill or note by post, if that be the ordinary mode of transmission between them, and the bill or note be lost or stolen, the loss will fall on the party to whom the bill or note was intended to be remitted. In this case the post was the ordinary mode of transmission ; the Hoondee came by post and was attempted to be returned by post. But I now come to the serious point of this case, and in my opinion this is a matter of considerable importance to Bankers. It has always been a nice point for a jury what amount of neglect will fix a party with liability. In my opinion in this case the Bank is liable, and there has been such neg-

lect as will fix the Bank with liability, and discharge the defendant from the cause of action by reason of that neglect. I stated yesterday that I recollected a case where a valuable security was put in a letter by a Merchant, and left on a table in the Counting house, that being the usual place for depositing letters for the post, and the Court held there could not be evidence given of the contents of that letter, and that some evidence must be given that the letter was taken from the house, and put into the post. I have found that case. See *Hawkes* vs. *Salter* 4 Bing. 715. I believe every thing Mr. Wilkinson has said, and that he put the note in a letter sealed and stamped. We have the entry in the Bank Book of the postage stamp of 1 anna having been affixed on a letter to Major Obbard on 7th January. I will show that that letter must also be shown to have been put into the post. Neither Mr. Wilkinson nor any other person can say to which of the three peons the 7 letters were given. The fact of those letters having left the Bank would not be sufficient unless it were shown they were put into the Post Office. The stamping is not enough, it is necessary to prove the posting see *Hawkins* and *Rutt* 1 Peake N. P. C. 248. Hawkins and Rutt has been slightly quarrelled with, but it may be explained by the fact, held to be good law, that the bell-man employed was not a Government officer, *Note to Smith's Mercantile Law* 538. Was there not in this case a temptation to Chowburga who knew the bill would be paid the following day, and ought not that fact, to have made the Bank cautious how they dealt with the security. The next case I will refer to is *Skilbeck* vs. *Garbett* 7. Q. B. 846, which clearly shows that some evidence of a posting, as giving a letter to a public servant, is necessary before evidence can be given to prove the letter, or that the Bank did their duty in regard to forwarding the Hoondee, and I may here notice, that the only evidence of neglect against the Bank, is that which occurred after Mr. Wilkinson stamped the letter containing the lost Hoondee, *Byles on Bills* page 259, 5th Edn. There is no such evidence given in this case, but general evidence was attempted to be given yesterday how the Peoples Bank dealt with letters. I yesterday gave my reason for considering that the Section of the Indian Act (sec. 50, Act 2 of 1852) had not been complied with. Where is the proof of *despatch* of the letter out of the Bank. No person has been pro-

duced to prove who took the letter to the post. I cannot presume despatch of that letter because I believe Chowburga got the money. There is no proof the letter went or was sent out of the Office, and it could not have gone out because it had the Bank stamp afterwards affixed. If it had been proved that the letters had been put into a letter-box, and that a postman came for those letters, I should have held under the 50th Section, there was proof of the despatch of that letter. The case *Skilbeck* vs. *Garbett* slightly impugns *Hawkins* and *Rutt*, but Lord Denman says that the Bellman was probably not a public Bellman. There is no proof of a despatch in law of that letter. Therefore the Bank is bound to show the letter was posted. Chowburga's statement that the bill would be paid apprised Mr. Wilkinson it would be cashed next day, and therefore due caution was not used, and it would be hard on Major Obbard that he should lose the proceeds, having transmitted the Bank a really good bill, and the Bank not having exercised proper caution. In my opinion Major Obbard can never recover from Ramsoroop. The Bank should have been able to have proved that the letter was actually posted, or if not posted that it left the office in custody of one capable of receiving the letter for the Post Office Authorities, and therefore they are liable. Any jury would believe that the bill was cashed by a person connected with the Bank. Mr. Wilkinson has himself said he believes it, and so do I. He swears the receipt in red ink was not on the back when he sealed his letter. The proceeds of the note are traced in part through Chowburga's own hand to the Bank of Bengal and the Oriental Bank. The notes are all traced to him or his accomplices. The receipt is not signed in Chowburga's name. He may have put a feigned name on. He was known as a servant of the Peoples' Bank, and who but Chowburga knew that the bill was payable on that day the 8th?

I am not going to rule the Bank is liable because the note was cashed by a person of the Bank, although I have shown Major Obbard is discharged by the Bank's neglect. If the Bank has a valuable security taken out by one of its clerks, is not that sufficient to make the Bank liable? The cases in Hilyard on Torts page 352 show that it is. It is supported by American cases but the Book is

often cited as an authority. I am not putting my decision on this point but for topping my judgment by this view of the case, should I be wrong in fixing the Bank with neglect in the way they dealt with the letter. I have shewn from Hilyard that a Bank is liable for default of its agents. I now refer to "Smith on Master and Servant" The authorities there quoted show, how persons are civilly liable to third parties, for the fraudulent, and even criminal acts of their servants.

There is a recent case showing that there are many acts of a servant for which, though criminal, the master is civilly responsible, *Dunkely* vs. *Farris* 11 C. B. 457 see also Blackstones Commentaries 1, p. 430. Here a Banker's servant, I believe, did receive money, and I see no difference whether I go to a Bank and pay in money, or the Bankers' servant is sent by the Banker and receives it from me. I have taken pains if I am wrong on one point to give my opinion on the other, and if I am wrong I may be easily set right. I have given reasons for holding the defendant is not liable on an overdrawn account, and that this action must be dismissed with No. 2 costs.

IN THE MATTER OF TAYHEB ALLY AN INFANT.

According to Mahommedan Law a Mother is entitled to the custody of her child, if such child be a Male till it shall have attained the age of 7 years, if such child be a Female till it shall have reached the age of Puberty.

A Mahommedan Infant name Tayheb Ally aged 5 years was brought into Court by its father in obedience to a Writ of Habeas Corpus. The Writ had been issued at the instance of the mother who sought to transfer the child to her own custody. Affidavits by the mother and the maternal grandfather were tendered in support of the application. They alleged that the father Abdool was leading a vagabond life and destitute of means to support the infant: they further stated that he had been guilty of acts April 2nd 1864.

of the grossest immorality, and that the child could not remain in his charge without the greatest danger of moral and physical injury.

Graham on behalf of the father shewed cause. He submitted that the affidavits in support were vague and general, and entitled to but little credit. The affidavit of the father denied the charges and alleged that the application was not bonâ fide on the part of the mother, but that she was acting under the influence of others who had purposes of their own to serve: at least she ought to be examined that it might be ascertained whether she was really desirous of removing the child from the custody of the father.

Woodroffe who appeared in support of the Writ was not called upon to reply

Levinge J. said that he should not now decide the question as to whether the father of the child was or was not leading an immoral life. It was perfectly clear according to Mahomedan Law that the mother was entitled to the custody of the child. It was laid down in the *Hedaya* Vol. I pp. 385-388, that a child, if a boy, was to remain in that custody till 7 years of age, if a girl till puberty. It had been urged in support of the father's case that the present application was not really preferred by the mother but by the grandfather, and that for certain purposes of his own. There seemed however, to be but little doubt as to the application of the mother being *boná fide.* If the mother were detained and subjected to duress, as alleged, nothing would be easier than for the husband to apply to the Court for redress. It was not a little remarkable that Statute 2 and 3 Vic, c. 54 which did not extend to this country, had conferred upon the Court of Chancery in England the power of delivering up children under 7 years into the custody of their mother. The Mahomedan Law, therefore, in this respect, was in unison with the English Law. No allegation had been made against the morality of the mother, and it was clear from the affidavits that the man had no means of support. He therefore ordered the child to be delivered over to the mother.

DAS MERCES *vs.* CONES.

A Bequest by a Roman Catholic of Portuguese descent, born and domiciled in Calcutta, for the performance of masses, is not a gift to superstitious uses.

The Marriage of an East Indian, domiciled in Calcutta, with the sister of his deceased wife, is not void under 5 *and* 6 *W. IV. c.* 45.

The Advocate General with *Graham* and *Newmarch* for the plaintiff.

Eglinton for the defendant Anthony Cones.

Woodroffe for the defendant Mary Cones.

Coryton with *Pittar* for the defendants Henry Aloysius and William Victor Cones.

Evans for the Crown.

April 1, 1864.

Norman C. J.—This is a suit by Lavinia Virginia and Cecilia Matilda, daughters of Joseph Cones, and their respective husbands, alleging that Joseph Cones formerly of this city, died possessed of considerable estate and effects, and amongst other things the *Phœnix* Printing Press, and Printing business in Calcutta, and leaving a Will, dated the 31st of December 1860, proved on the 3rd of July 1863 by the defendant Anthony Cones, the Executor, who has taken possession of the Estate, and partly administered the same ; that several of the directions and bequests raise questions of law of much difficulty, and the plaintiffs are desirous of having the same determined, and the Estate administered by this Court. The plaintiffs pray that the trusts of the Will may be declared and carried into effect, and that the rights and interests of all persons under the Will may be declared and ascertained ; and that due directions may be given as to the bequest of the Printing Office in the Will mentioned, and for the payment to the testator's widow, and for the charitable and other bequests : that all necessary accounts may be taken, and the estate applied in due course of administration.

The material parts of the Will are as follows :—Clauses 1, 2 and 3 recite that the testator was the sole Proprietor of the *Phœnix* newspaper, and the printing business carried on under the names of Sanders, Cones and Co., that he held thirty shares in the Bengal Printing Company, and fifty shares in the People's Bank. By Clause 4, he bequeathed a policy of assurance for Rs. 6,000, and his plate, linen, furniture, horses, carriages, &c., to his wife Mary Cones absolutely. By Clauses 5 to 12, the testator bequeathed pecuniary legacies, amounting in the whole to Rs. 6,000. By Clause 13, he gave Rs. 1,000 for his funeral expenses. By Clause 14, he directed his Executors, to invest Rs. 2,000 in Government Securities, upon trust, to pay the half yearly interest to his daughter, the plaintiff, Lavinia Virginia Merces, for the term of her natural life, independently of her husband, her own receipt for the same to be a sufficient discharge, and upon her death to pay the principal thereof to her children in equal shares absolutely. Clause 15 was a similar bequest in favour of the plaintiff, Cecilia Matilda Merces. By Clause 16, 17, and 18, he directed the investment of Rs. 2,000 for William Victor Cones, Rs. 5,000 for Henry Aloysius Cones, and Rs. 5,000 for Josephina Evelina Cones, with a provision in each case that if they died unmarried, the money should be divided amongst his or her surviving brothers and sisters. Clause 19 directs "that the above several legacies be paid out of the cash money in my possession, and the income arising out of my investment." Clause 20 is as follows—"I direct that my wife Mary Cones, shall be paid Rs. 130 monthly, for her maintenance during her natural life, out of the profits arising from my Printing Establishment, my Bank shares and other investments, as long as she shall continue my widow, but in the event of her being married after my decease, the same shall forthwith cease. But if she shall continue my widow until her death, and shall leave her children by her former husband destitute, &c., then I direct that a donation of Rs. 2,000 out of the profits of the Printing Office, shall be paid to them equally share and share alike." Clause 21 directs that the Government Security for Rs. 8, 500, and any other security she may purchase in her own name out of the interest thereof, and the lower-roomed house, &c., which his wife Mary Cones

received from the Estate of her former husband, shall not be mixed up with his property ; but that after his death the same shall be made over to her. Clause 22 directs that his daughter, Josephina Evelina Cones be paid Rs. 50 monthly, &c., out of the profits of his Printing Establishment. Clause 23—" I desire that High Masses in Honour of the Blessed Virgin may be celebrated every Friday during the year, and that a Novena of St. Joseph with High Masses may be performed every year after my death ; the former to cost Rs. 318, and the latter Rs. 200 per annum." Clause 24.—" I desire also that Masses be performed every month for the repose of my soul, and that of my mother Maria Cones ; and also that a High Mass be performed for the souls of the faithful departed." Clause 26.—" I give and bequeath my Printing Office, and the proprietary right of the *Phœnix* newspaper, and also the good will, stock in trade and furniture of the office, to my brother, Anthony Cones, my sons, William Victor Cones, and Henry Aloysius Cones, to be held by them in equal shares and proportions, but I desire that my brother, Anthony Cones, shall have the principal management of the concern, and my sons W. V. Cones and H. A. Cones, shall be guided by him in all matters relating thereto, and that all members of the firm shall devote their entire attention to the furtherance of the interests of the press. If any of my sons neglect their work, and do not bestow all their time and attention to the business, he will forfeit his right to a share in its profits, and will be entitled to only a salary proportionate to the work he may perform : and I direct that after payment of the sums hereinbefore directed out of the profits of the said Printing Office, the remainder of the profits be divided amongst them, the said Anthony Cones, William Victor Cones, and Henry Aloysius Cones, in equal shares and proportions, for their respective benefit and use, but I desire that all such monies as may be found in the Office at my death, be invested forthwith in Government Securities for the benefit of my Estate."

Anthony Cones was called as a witness by the plaintiff, and proved that the testator's widow, Mary, was his second wife, the sister of his first wife, that the testator's father was an Italian ; that his wives

were East Indians of Portuguese descent; that all the parties were Roman Catholics, and that the testator's widow, Mary Cones, was married to him at a Roman Catholic Church, and always passed as his wife; that the testator's Estate consisted of

Fixed Deposit in the Mercantile Bank about	37,000
Lent on mortgage to one Smith	16,000
Do. to a Native, Chowdry, about	10,000
Do. to one Longman	3,000
Lent in small sums to various persons	2,000
Outstandings ...	10,000 to 12,000
Estimated value of Bank Shares	2,500

that the shares in the Bengal Printing Office had been sold before the death of the testator; that the printing business is now carried on by the Executors at a loss of from Rs. 150 to 200 a month; that losses on the business have been paid out of the general assets of the estate, and that it is impossible to carry on the printing business without employing such assets for that purpose; that if the assets should be recurred to for payment of the annuities, they would be insufficient to pay the legacies in full. He said that he was desirous of selling, and had attempted to sell the printing business; and that he believed that it would be for the benefit of all parties to do so, but that he could not do so without the order of the Court.

Mr. Coryton for W. V. Cones and H. A. Cones, cross-examined this witness, in order to shew that he did not manage the business properly, and did not devote his whole time, but only two hours a day to it. The Rev. Augustin Goria, the Pro-Vicar, was called as a witness on behalf of the defendants W. V. Cones and H. A, Cones, and proved "that a Novena is a practice of worship for nine days. In Europe it consists of nine services, nine sermons, and nine masses. Here there are no sermons; it is for the benefit of the soul of the testator; that is the object and purport of it." On cross-examination he stated, that "the service was intended for the public: if there are not sermons, there are public prayers. A living person might give a sum for a Novena, the benefit would be as if he had given a sum to

promote charity or piety" On cross-examination by the Advocate General, he said that "if it is not for any particular soul, it is for the benefit of all the souls in purgatory."

The first question that arises is out of what fund the legacies mentioned in Clause 19, are to be paid in the first instance. On that point, I am of opinion, that the legacies are demonstrative, and that having reference to all the facts and circumstances of the case, the words "cash money in my possession" must be taken to include the money at interest in the Mercantile Bank. If an authority in support of that view were needed, it is to be found in *Manning* vs. *Purcell* 7 De G. M. and G. 55. By investments, I think that the testator, meant to refer to his Bank shares, and other pecuniary investments, as distinguished from his printing business.

Secondly.—The gift to Mary Cones in Clause 20, appears to me to be also a demonstrative legacy, and to be charged not only on the profits of the Printing Establishment and Bank shares, but also on the monies in the Mercantile Bank. These monies appear to answer the general description of "investments," and there is nothing that leads one to suppose, that the testator meant to exclude his wife from the benefit of a charge on that deposit, as well as his other invested monies.

Thirdly.—By Clause 21, the testator declares that he has never reduced into his possession the Government Securities, or other property, which his wife derived from her first husband. To prevent any mistake, he distinctly states that this property forms no portion of his assets, but is the absolute property of his wife.

Fourthly.—With respect to the gifts of annuities to Mary Cones and Josephina Evelina Cones, by Clause 20 and 22, out of the profits of the Printing Establishment, they constitute a charge on the business, which may be satisfied out of the Profits, if the Executor and the testator's sons choose to carry it on, but which will have to be provided for out of the proceeds if the business is sold.

Fifthly.—It was contended that the gift of Rs. 518 annually for High Masses every Friday in honour of the Blessed Virgin, and a Novena of St. Joseph, with High Masses to be performed every year, after the testator's death in Clause 23, and the direction in Clause 24 that Masses should be performed every month for the repose of the testator's soul, &c., are void as gifts to superstitious uses.

Possibly there is a distinction between the gift in Clause 23, which might be good as a charitable bequest for a general public use, *viz.*, public services in the Church, and the direction in Clause 24, that Masses should be performed for the testator's soul, which is simply to secure a personal benefit to the testator himself, and the souls of the other deceased persons named. But I prefer to deal with the question on a broader ground. Calcutta having been originally acquired by the East India Company, of a regularly constituted government, in a country peopled, and having laws, a government, and religion of its own—those portions of English law, the provisions of which are manifestly inapplicable to the circumstances of the settlement, cannot be assumed to have been introduced into the country. On that ground in the *Mayor of Lyons* vs. *The East India Company*, 1. Moo. Ind. Appeals p. 175, it was held by the Privy Council, that the introduction of the English law into the country, did not draw with it that branch of the law which incapacitates aliens from holding real property to their own use, and transmitting it by descent or devise. In *The Attorney General* vs. *Stewart* 2 Merivale 143, on similar principles, it was held that the Statute of Mortmain did not extend to colonies governed by English law, unless it had been expressly introduced there, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country. In *Ranee Hurrosoonderee Dossee* vs. *Raja Kistonath Roy* reported in the *Englishman*, 26th April 1861, the late Supreme Court held, that the law of forfeiture in case of a *felo de se*, was not part of the law of England which could be deemed to have been introduced. Sir Barnes Peacock in delivering judgment, alluding to the cases above cited, says :— "In construing the Charter of 13 Geo. I. (which is supposed to have

introduced the common law of England, and the statute law as it existed prior to 1726 into this country) there can be no doubt that it was intended that the English law should be administered, " as nearly as the circumstances of the place, and the inhabitants, should admit of. . The words " give judgment according to justice and right in suits and pleas between party and party" could have no other reasonable meaning, than " justice and right according to the laws of England, so far as they regulate private rights between party and party." Such general words could not possibly refer to any law such as the Mortmain Act or the Alien laws, which had reference merely to some views of public policy, supposed to be applicable to England, even though private rights might be affected by them. Still less could they be supposed to refer to the rights or revenues of the Crown, depending upon prerogative, and which were wholly inapplicable to a territory to which the sovereignty did not extend."

By the law of England, gifts to superstitious uses appear to be void, as being contrary to the policy of the law for two reasons—first, because they tend to produce the same losses and inconveniences to the crown and subjects of the realm, as in cases where lands are aliened in Mortmain, see the preamble of the Stat. 23, H. 8. c. 10; and, secondly because " the superstitions and errors in Christian religion have been brought into the minds and estimations of men, by reason of their ignorance of their every true and perfect salvation, through the death of Jesus Christ, and by devising and phantasying vain hopes of purgatory, and masses satisfactory to be done for those which be departed, which doctrine and vain opinion by nothing more is maintained and upholden, than by the abuse of trentals (offices for the dead continuing thirty days or consisting of thirty masses), charities, or other provisions, made for the continuance of the said blindness and ignorance. See the preamble of Stat. I. Edw. 6. cap. 14. So in Bacon's abridgment title" Charitable uses " and Mortmain" (D), it is said that the king is entitled to such uses " by force of several statutes, and as the head of Church and

State, and entrusted by the Common law, to see that nothing is done in maintenance or propagation of a false religion." A law intended for the support and maintenance of the Protestant branch of the Catholic Church and to discourage the teaching of doctrines at variance with it, cannot have been intended to be introduced here at a time when the Christian religion was not, and never could have been supposed, to be likely to be the established religion of the country. In *Reed* vs. *Hodges* 1. Irish Equity Repts. p. 17. Blackburn M. R. following a previous decision of Lord Manners in "*The Commissioners of Charitable Donations* vs. *Walsh* 1. Irish Equity Reports p. 34 note, held, that in Ireland a bequest for Masses for the soul of the testator was not void as being for a superstitious use, apparently upon the ground that the statute of Edward VI. was not in force in Ireland, and that although the policy of the common end of the legislature of England and Ireland to receive and complete the Reformation was the same, the policy of the particular measures which the several legislatures adopted for that purpose was different." If such a gift be not void in Ireland, *a multo fortiori* it is not void here where the Crown cannot be supposed to have contemplated, either the end which the English Legislature had in view in passing Statute 14 Edward VI., or the means by which that end was to be attained. It is clear that the policy of the law intended to be introduced into this country, not only by the Charter of Geo. 1., but by all subsequent Charters and Acts, was one of toleration; that the English Government never considered it as any part of their duty to impose the Protestant religion on their subjects, or in any way to interfere with their religious opinions or practices connected therewith, however erroneous or false. The Charter of the 13 Geo. 1., begins by reciting that "the East India Company, have by a strict and equal distribution of justice, very much encouraged, not only our subjects, but like wise the subjects of other provinces and the natives of the adjacent countries, to resort to and settle in the said towns, factories, and places, especially in Calcutta, Madras, and Bombay, and to enable them the better to administer justice." Corporations were established with power to administer justice, and it was provided that of the aldermen, seven

should be natural born subjects, and two the subjects of any other Province or State, without at that time making any distinction as to their religion. After the English Company had acquired the sovereignty of the country, the legislature by the 18th section of the 23, Geo. 3. cap. 70, enacted, that, in order that "regard should be had to the civil and religious usages of the said Natives" *i. e.* Mahomedans and Gentoos—the rights of fathers of families and masters of families, shall be preserved, and acts done in consequence of the rule and law of caste, respecting the members of the said families only, should not be adjudged a crime, though the same may not be held justifiable by the laws of England." The 19th section also enacts that the rules and orders of the Court were to be accommodated to the religion and manners of such natives. Though these clauses in terms deal with the religion of Gentoos and Mahomedans only, they shew most conclusively what was the policy of the law intended to be introduced by the British Government into the country. As a further illustration of the policy of the Government in dealing with questions of religion in the territories acquired by the East India Company, I may add that the Charter of Charles II. with respect to Bombay, which had been ceded by Portugal to the British Government, contained a *proviso* that the inhabitants of the island should be permitted to remain there, and enjoy the free exercise of the Roman Catholic religion. For the above reasons, I am of opinion, that that portion of Common law which declares gifts to superstitious uses void, does not apply to the gifts of persons born and domiciled in Calcutta, and therefore that the gifts and directions in the 23rd and 24th Clauses, cannot be treated as being void upon that ground.

Sixthly.—With respect to the 26th Clause, Anthony Cones desires that the printing business should be sold, and there must therefore, clearly be a decree for that purpose. It is perfectly clear that an Executor cannot be compelled against his will to carry on the business of a testator, by which he might be subjected to the operation of the Bankrupt or Insolvent law. In fact he is not entitled to employ the general assets of the estate in doing so, and therefore could not recover

himself if he sustained losses in the business : *Ex parte Garland* 10. Vesey p. 110. In taking the account in the present case Anthony Cones, William Victor Cones, and Henry Aloysius Cones, will have to bear the losses that have been sustained in the attempt to carry on the business. On the sale of the business the legatees will be entitled to have their legacies paid or provided for out of the proceeds as part of the assets of the testator's estate; and if there be any surplus after satisfying the charges on it, such surplus will belong to Anthony Cones and the testator's two sons.

Lastly.—It was contended that the testator's widow, Mary Cones, will not be entitled to a share of the surplus under the statute of distributions, on the ground that her marriage was not a legal one. But as the parties were not domiciled English subjects, but East Indians, born and domiciled in this country, they were not affected by the 5 and 6 W. 4 c. 45. see *Brook* vs. *Brook* 9 H. L. C. 193. Therefore, assuming that the law of this country applicable to the case of country-born persons, being Roman Catholics of Italians or Portuguse descent, makes a marriage with a deceased wife's sister incestuous and unlawful; the marriage must, by the law of England, as in force before that statute, be deemed to be good to all intents, unless pronounced void by the sentence of an Ecclesiastical Court in a suit instituted during the life of both parties. 1 *Blackstone's Commentaries*, p. 434. Mary Cones must therefore now be taken to have been the lawful wife of the testator, and must be declared entitled to his share in residue on that footing.

BERROOPPO SETTY *vs.* HURSMULL RAMCHUND.

A Policy was effected upon a quantity of piece goods, part in bales, and part in cases. The bales and cases were separately enumerated, and separately valued in the body of the Policy, but the gross total was made up. Held that the words "free from particular average," following directly upon the gross total, must be taken to apply to the whole value of both lots, and not separately to the bales, and separately to the cases.

Woodroffe for plaintiff.

Newmarch for defendant.

Levinge J.—This is an action on a Marine Policy of Insurance. The plaint alleges that the defendant, on the 15th day of January 1863, granted to the plaintiff a Policy of Insurance of that date, underwritten by the defendant, insuring 41 bales of Piece Goods, value Rs. 18,450, and 12 cases of ditto, value Rs. 5,400, in a voyage from Calcutta to Madras, in the Steamer *Burmah*, "free from particular average", and requiring notice of loss to be given six months before payment; it further avers that the steamer left Calcutta for Madras on the 20th day of January 1863, with the goods on board, that she stranded and became a wreck at Palliacut, and claims payment from the defendant of Rs. 23,850, the amount insured, alleging that there was a total loss of the goods. April 29 1864.

The clause in the Policy is as follows :—" The said goods and merchandizes laden thereon for so much as concerns the assured, or by agreement between the assured and the Company in the Policy, are and shall be

N. N.	41 Bales Piece Goods value Rs.	18,450
,,	12 Cases of Do ,, ,, ,, ...	5,400
	Company's Rs.	23,850

free from particular average which shall be proved in case of loss."

The written statement put in by the defendant is very concise. It admits the Policy, and states it was made free of particular average, and that only half per cent. premium was paid, and contains this paragraph which is the gist of the defence :—" The *Burmah* was stranded off Palliacut and became a total wreck, but of the goods mentioned in the said Policy of Insurance, a portion, that is to say, two bales of the said piece goods marked N. N. respectively, were saved. The defendant therefore contends that there has been no total loss, and that he is not liable to pay the sum claimed or any part thereof."

The loss of the ship has been proved, the notice of abandonment and subsequent withdrawal of that notice is admitted; nothing turns on this. Also the 6 months notice of loss is admitted by the defendant.

There is not much controversy on the evidence. Both sides agree that the 12 cases were totally lost, and the plaintiff has contended that there was a total loss of the 41 bales marked N. N., I first find, as a matter of fact gathered from the evidence, that there was not a total loss of the 41 bales, inasmuch as I am satisfied that two bales were saved. Then Mr. Woodroffe has raised another point. He contends that these two bales were jettisoned, and consequently it must be held that the 41 were totally lost. On the question of fact I hold that there is no evidence to warrant the Court in finding that they had been jettisoned. If they had, and were subsequently retrieved and sold for the insured, how could it be said that there was a total loss, inasmuch as jettisoned goods belong to the owner. It has next been contended that the goods were so damaged as to be almost worthless, and that the Court should hold that there was a constructive total loss. I cannot so find, as it is proved that the goods were valued at Rs. 9 a piece, and were sold at Rs. 6-13 a piece—total Rs. 340-10-0. Lastly it has been contended that there is no satisfactory proof that the two bales saved were part of the 41 bales insured, and that the onus lies on the insured to prove they were, the loss of the ship being admitted. I have no doubt that the bales sold, formed a portion of the bales insured, inasmuch as they are proved to have been marked "N. N. 41", and in the absence of the plaintiff showing that any other piece goods on board the *Burmah* bore the same mark and number, I can come to no other rational conclusion, than that these two bales were part of the 41 insured, and therefore that there was not a total loss of the 41 bales.

The remaining matter I have to decide is, was there a separate insurance on the 41 bales as one lot of goods separately insured from the 12 cases? If there was, the plaintiff ought to recover Rs. 5,400 for the 12 cases totally lost. The law is too clearly settled to allow an argument to be raised on the construction of the Policy, that

there was a separate insurance on each bale. It is now settled law that where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the Policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum, *i. e.*, "*free from particular average*," exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed, or otherwise lost by the specified perils—*Ralli* vs. *Jansen* 6 E. and B. 422.

It is argued for the insured that the goods in the cases were insured separate and distinct from the bales ; that such is the fair construction of this Policy, and that it differs materially from the Policy proved in the leading case of *Ralli* vs. *Jansen* 6 E. and B. 422 ; and in *Entwistle* vs. *Ellis* 2 H. and N. 549, and *Hajee Joosoop* vs. *Vardon*, Hyde's Reports Vol. I, p 198, inasmuch as those cases show that the enumeration of the articles insured was contained in the margin, or by endorsement, and not in the body of the Policies, which simply contained the valuation in bulk, whereas in the present case it is argued that there is, in point of fact, a separate valuation in the body of the Policy, and such separation of the articles, the bales from the cases, as shows the intention of the contracting parties to effect a separate insurance on each lot. In *Entwistle* vs. *Ellis*, some of the Judges doubt, that, if the memorandum had been inserted in the body of the Policy, it would have made any difference.

The conclusion I have arrived at is that there was no intention to insure each lot separate and distinct from the other, and that there is nothing in the language of the clause quoted, or in the entry of the two lots in the body of the Policy in the form set out, sufficiently strong to warrant the conclusion that such was the intention. The words "free of particular average," following directly on the gross total value, apply in my opinion to the whole value of both lots, and are not meant to apply, separately to the bales, and separately to the cases. I

consider that inasmuch as one lot consisted of bales, and the other lot of cases of the same goods, they were very naturally separately enumerated, and their value separately stated, not for the purpose of affixing a separate value oneach lot for the purpose of a distinct insurance, but merely for the purpose of enumerating the articles, and their value, with the object of arriving at the gross total value, to which the words "free of particular average" apply. The goods are precisely the same, *viz.*, piece goods, at Rs. 9 a piece; each bale and each box contains 50 pieces. The only difference is, that 41 were purchased in bales, and the remaining 12 in cases. I cannot therefore hold that the Policy expresses an intention to insure each lot separately as well as the whole jointly. The case would have been much stronger for the insurer if the valuation stood separate without a gross total being made up, for then the words "free of particular average" might fairly be taken to apply to each separate lot, as well as to both jointly, but following directly on the gross total, I think the words apply solely to the result or total quantity, and cannot be taken as applying distributively and separately to each separate and distinct lot. It has been urged for the insurer that the lowness of the premium, half per cent, would indicate the true nature of the contract, but I think the Court must construe the clause as it stands without reference to that consideration. On the one hand, it may be said for the insured, that it is hard to lose the amount of the Policy, Rs. 23,850, because two damaged bales, value Rs. 900, have been saved by accident; but it would be equally hard on the insurer to hold him liable, as he only received one half per cent. premium, being Rs. 119, less discount. If the insurer stipulated to be exempt in case of partial loss of the whole of the piece goods, he is entitled to a verdict, and I think he did so stipulate.

There only remains to notice one other matter. The Policy is in the printed form of a general average Policy. There is to be found in it the printed covenant—"I, the assurer, do hereby covenant, promise, and agree, and oblige myself, heirs, executors, goods, and chattels, in case of total *or partial loss* (which God forbid), to satisfy, and pay the sum of money by me so assured." Inasmuch as those words are

repugnant to the expression inserted in writing, *viz.*, "free of particular average," they must, I think, be held to be overridden and controlled by the particular words "free of particular average," which means, free of liability to pay for any partial loss; whereas the words in the printed covenant mean a covenant to pay for a total *or partial loss*, wholly repugnant to, and inconsistent with, the previous declaration. I therefore dismiss this suit, and decree costs to the defendant to be taxed on scale No. 2.

Suit dismissed accordingly.

GREESCHUNDER BONNERJEE *vs.* COLLINS.

A who has no regular office, but comes once or twice a week from the Moffussil to a friend's house in Calcutta, and sees people there on business, contracts with B. in Calcutta for the hire of certain Cargo Boats. While being towed by a Steamer, which A had chartered according to agreement, the boats when beyond the jurisdiction of the Court, sustain great damage by reason of gross negligence place on the part of C. whom A had placed in charge. Held (1) *that "the cause of action" did not arise in Calcutta* (2) *that A "carried on business" in Calcutta within the meaning of Sec. XII. of the Charter* (3) *that A. must be held responsible to B for the negligence of C.*

The Advocote General for the Appellant.

Doyne and *Coryton* for the Respondent.

May 2, 1862.

Norman C. J.—This is an appeal from the judgment of Mr. Justice Levinge. The action is for money due for the hire of eleven cargoboats, let by the plaintiff to the defendant on the 23rd and 24th of June, 1863, for the purpose of being towed down the river by steamer to Russelpore, and from thence to Narainpore,—and also for damages, for the loss of one boat and injury to others, occasioned by the negligence

of the parties in charge of the towage. It appeared from the evidence of the plaintiff that on the 23rd of June, 1863, he met the defendant at Mr. Holmes' office at 5 China Bazar, in Calcutta, when the defendant said he wanted to have some salt conveyed from Russelpore to Narainporé, and wished the plaintiff to supply boats for that purpose. The plaintiff said it was a bad time of the year; that boats could not be sent down safely by themselves; and that the only way would be to have a steamer. Collins said he had secured a steamer. The plaintiff stated as follows—" The written agreement was this letter written by Holmes and signed by Collins:—

'BABOO GREESCHUNDER BONNERJEE.

'Sir,—Please send four boats to Ghoosery this evening for the purpose of being towed down to bring up salt from Russelpore to Narainpore. The boats are engaged at Rs. 150 per month each, for one month.

'Yours faithfully.

(Sd.) 'J. SCOTT COLLINS.

'23rd June, 1863.'

'Another order was given on the day following at the same place:—

'Please send two cargo-boats to-day, and on the 26th, six, to Russelpore, for the purpose of bringing up Government salt to Narainpore salt golahs. The boats are engaged at Rs. 150 per month for each boat.

'Yours &c.,

'J. S. COLLINS.'

'The defendant said 'You must supply twelve boats.' He said so previous to the 23rd. The price was five rupees a day. The boats were to be towed by a steamer and back. There was no agreement in

writing. At the first conversation something was said about the terms. He said I was to get Rs. 5 a day, or Rs. 150 per month, and the steamer was to go. The boats were to be loaded with salt at Russelpore and proceed to the salt golahs at Narainpore. They were to be towed to the place of loading by the steamer, and thence by steamer to the place where they were to be unloaded. Mr. Collins was to give the steamer. There was no other conversation. There was this *chittee*, and following this another *chittee*. There was a conversation about twelve boats. The first conversation was that I was to supply as many boats as would be required on those conditions, After that I got this *chittee*. I have told you the conversation. The first contained all the terms and conditions. This (B) is the other *chittee*. It was written by Hurris Baboo, and signed by Mr. Collins in my presence."

The plaintiff sent the boats to Ghoosery. The boats were towed by a steamer called the *Linnet*, which had been chartered by the defendant from Calcutta to Culpee. On the morning of the 27th the weather was stormy, and, according to the evidence of the *Manjee*, to which the learned Judge gave credit, they were unwilling to proceed A jolly-boat was, however, sent from the steamer, and they were forced to take up their position astern, and proceed on the voyage against their desire. This was at half-past 9. At 10 a storm commenced. But the steamer proceeded, towing the boats, though there was a strong ebb tide, and a gale blowing right a head. The learned Judge finds that, from the state of the weather from 10 to 12, great danger must have been caused to the boats, which were liable to be swamped, being propelled rapidly through the water against a head sea. At 12 the storm was so violent that the steamer was obliged to stop. She altered her course, swept round, and stopped towing. Barges 8, 3, and 4 were being towed by the hawser of the steamer, which was attached to these three boats which were next to the stern of the steamer; the others were fastened with their own tackle. They became detached by the sudden jerk caused by the stoppage of the steamer in the heavy sea, and the boats were thus brought into collision. The consequence was that the three barges—2, 9, and 6—were crushed together. The bows

of No. 4 ran with great violence against the rudder or stern of barge No. 3, and were stove in. No. 4 began to fill and sink, and the crew therefore left this boat, and scrambled into the next boat with some difficulty. The Judge finds that it was the duty of the persons in charge of the steamer to have stopped when it began to blow at 10 o'clock, even supposing that they had exercised due caution in leaving their moorings at 9-30, and that the boat No. 4 was sunk, and the other damage caused, by reason of the collision which happened, in consequence of the steamer carrying on in bad weather, and against the remonstrance of the *manjees.*

The first question raised before us on appeal was, whether the Court had jurisdiction in respect of so much of the claim as seeks for damages, in respect of the loss of one, and injury to other boats.

If the only ground of jurisdiction had been that the contract was made in Calcutta, the argument of the Advocate-General must have prevailed. The words " if the cause of action shall have arisen," in the 12th Section of the Charter, mean the entire cause of action—not the contract alone, nor the breach alone. In *Hernaman vs. Smith*, 10 Exch., 659, the defendant had offered reward to be paid on the conviction of offenders. An offender was apprehended within the jurisdiction of a County Court at N——, but tried and convicted out of the jurisdiction ; and it was held that the cause of action did not arise within the jurisdiction of the court. In *Borthwick* vs. *Walton*, 15 *C. B.* 501, the plaintiff, who resided at Manchester, sold goods to B. at Oxford. The goods were packed and sent to the railway station at Manchester for transmission to Oxford. It was held that the cause of action did not arise in Manchester, so as to give jurisdiction to the Manchester County Court. In *Barnes* vs. *Marshall* 18. Q. B., 785, the plaintiff, a carrier at Swindon, who had agreed to carry timber by barge to London at 16s. per ton, sued for the carriage in the Swindon County Court. On a motion for a prohibition it was held that the cause of action was not complete till the timber was delivered in London, and, consequently, the Swindon court had no jurisdiction. In the present case the injury to the boats occasioned by the recklessness and negli-

gence of the persons having control of the steamer, which, in fact, constituted the "cause of action", took place out of the jurisdiction of this court.

But the evidence shows that the defendant did "carry on business" within the local limits so as to give the court jurisdiction. Mr. Holmes who is the tenant of 5, China Bazar, which belongs to the defendant, says—"It is my place of business. The defendant comes there once or twice a week as a friend, and sees people there on business." It is proved that at that house the contract for the boats was made on the 23rd. The order for the additional boats was given on the 24th; and when the plaintiff applied to the defendant for compensation on the 30th, after the loss, he found him at the same place. The defendant describes himself as a contractor residing at Ghoosery. He said he "had contracts with the Railway Company and others: they were made at the office. The contract with the Government was made at Sandes' office. The house is my own and let to Holmes. I have no office in Calcutta." We think that it sufficiently appears from this evidence that the defendant does carry on business in Calcutta. We think that, to give jurisdiction, it is not essential to show that the defendant's office or ordinary place of business is in Calcutta, but that it is enough if he habitually uses the house in China Bazar, as a place wherein he does business. That he does so use the house in China Bazar is proved to our satisfaction by Mr. Holmes, whose evidence on the point is corroborated by the fact, that all the interviews between the plaintiff and the defendant upon the matters out of which this suit has arisen, took place in that house. Moreover, if the plaintiff, though residing at Ghoosery, habitually and constantly comes to Calcutta for the purpose of making contracts, and, therefore, for the purpose of carrying on his business as a contractor, that will, in our opinion, amount to "carrying on business, or working for gain" within the local limits, so as to give the Court jurisdiction.

Next it was argued that the plaintiff's cause of action was not against the defendant, but against the captain or owner of the steamer, and a great number of cases as to the liability of a master for the acts

of his servants, and the non-liability of persons for the negligent or other wrongful acts of independent contractors employed by them, were cited. They are wholly beside the question. The true substance and meaning of the contract was, that these Native boats were to be for the time under the control and direction of the hirer—viz., the defendant—and particularly, with respect to the time of starting and the mode of towing. From the very nature of things the defendant, or his agent on board, or with the steamer, must have exercised, and have been instructed to exercise such a power. There is no real analogy between this case and that of the charter of a ship, which remains under the command, direction, and control of the captain, who is the servant of the owner. It was the duty of the bailee, or hirer, under the circumstances of this case, to exercise reasonable and proper care in the management, and direction of the boats. If that be so, and the accident occurred in consequence of the negligence of any person whom the defendant chose to entrust with such control, whether he was in fact his brother, or the master of the steamer, or any one else, the defendant is responsible.

In *Addison on Contracts* the law is thus stated : " Every hirer of a chattel is bound to use the thing hired in a proper and reasonable manner ; to take the same care of it that a prudent and cautious man ordinarily takes of his own property."...... " The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not risks occasioned by negligence, or want of ordinary caution, on the part of the hirer."

In *Story on Agency*, sec. 400, it is said " If the injury is done by sub-agents employed by the hirer, the same responsibility for the negligent acts of the former about the thing bailed is incurred." It is manifest that the defendant could not get rid of his duty and obligation, by contracting with some one else to perform a duty, which was incumbent upon himself.

Chief Baron Pollock in *Hole* v. *The Sittingborne and Sheerness Railway Company*, 6, H. and N., 496, puts this case :—" Suppose a

person employs a contractor to build a house in London, and the contractor builds it so as to darken the windows of another person, is not the employer liable ?" Baron Wilde then says, "When work is being done under a contract, if an accident happens and an injury is caused by negligence, in a matter entirely collateral to the contract, the liability turns on the question, whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief; and the injury can only be said not to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, then the employer must be taken to have authorized the act, and is responsible for it. It is the same as if he had done it himself." In *The Great Western Railway Company v. Blake* 7 H. and N. 987, the plaintiff had taken a ticket at the Paddington station of the Great Western Railway Company for Milford in Pembrokeshire. The Great Western Railway terminates at Gloucester, but by arrangement between the Great Western and the South Wales Railway Companies, the fares are divided and the lines worked between them. After the train had passed on to the South Wales line, it came into collision with a locomotive engine, left on that part of the line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train. It was held that there was an implied contract on the part of the Great Western Railway Company, that they would use reasonable care to maintain the whole line from Paddington to Milford, in a condition fit for traffic. The Chief Justice, Sir A Cockburn, says : " It would be inconsistent with public convenience and safety, to put any other construction on the contract, than that the Great Western Railway Company should be primarily liable to the plaintiff, and should take their remedy against the South Wales Railway Company, whose servants by their negligence have caused the accident." In *Dalyell* v. *Tyrer*, 1. E. B. and E., 899 the court did not, in holding the owner of the ferry-boat liable for the negligence of the captain, decide that the person from whom the plaintiff took his ticket would not also be liable. The authorities, cited to show that the employer is not liable for the negligent acts of a contractor, have no application whatever in a case where either by contract, statutory, or other obligation, a duty is cast on the employer of which such negligence is a breach.

We are therefore of opinion that the defendant was rightly held liable, for the consequence of the reckless and improper conduct of the person in charge of the towage of the boats, in compelling the plaintiff's boats to proceed, and towing them at a time when it was most dangerous to do so. As to the last point, we think that on the evidence, the two written papers were not orders given subsequent to the making of the contract, but must be taken to have been, and did in effect, consitute the contract between the plaintiff and the defendant. They should therefore have been stamped, and we direct that they be now stamped.

Subject to the stamping of these papers we are of opinion that the judgment of the Court below must be affirmed with costs.

Macpherson J.—Concurred.

BINDOOMADUB MITTER *vs.* WOOMESCHUNDER PAUL.

A Case entered on the Undefended Board can only be transferred to the Defended Board on payment of the costs of the adjournment, if any, thereby occasioned.

Woodroffe for the plaintiff.

Hyde for the defendant.

Hyde applied that this suit, which was put into the Undefended List, should be transferred to the Defended Board, as the defendant had a defence, and intended to avail himself of it. June 27, 1864.

Woodroffe stated that the case had been put on the Undefended Board, because the defendant had not entered an appearance, and had given no previous intimation that he intended to contest the suit. He submitted that no adjournment should be allowed, except upon the terms of the defendant paying the costs occasioned by such adjournment.

Hyde submitted that the defendant had that morning entered an appearance, and that the case ought therefore in strictness to have been placed upon the Defended instead of the Undefended Board. The fact of its being placed upon the latter arose from the circumstance that, according to the practice of the Court, the Boards had been made up the day before.

Macpherson J.—If a defendant wishes to appear and answer in a suit, it is under Section 109 of the Civil Procedure Code that he must do so. The Section says—"On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance in the Court House, in person, or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court" so that any defendant appearing for the first time on the day fixed in the summons for his appearance, is entitled to have his answer taken and his case disposed of then, unless the hearing be postponed to a future day, which shall be fixed by the Court. He is not in any degree the less so entitled because his case happens to stand in the so called "Undefended Board." The two Boards in daily use may be a convenience to the Court and to the profession, but they cannot, and do not, affect the rights which the parties possess under the law which regulates the procedure of the Civil Courts, unless the Court chose to adjourn the hearing under the power given to it in Section 109. The defendant appearing for the first time on the day fixed in the summons for his appearance, is bound then and there to proceed with his defence, even though his suit is called on among the undefended cases. Cases in the Defended and in the Undefended Board are in exactly the same position as regards adjournment. They may be adjourned in either case, if the adjournment appear to the Court to be necessary, or if good cause is shewn why there should be an adjournment. But when a case is in the list for the day, and both parties are *primâ facie* bound to be ready to proceed, if an adjournment is rendered necessary by the laches or negligence of one of the parties, or if it be for his interest, and his interest only, that an adjournment should take place, the usual practice has always been,—and it is an obviously wholesome

practice,—that that party should pay all the costs attendant on the adjournment. The same rule must be applied to "undefended" as to "defended" suits. The party seeking an adjournment must necessarily shew sufficient cause for it, and pay the costs consequent upon it.

KISTOMOHUN MOOKERJEE *vs.* S. M. ADARMONEY DABEE.

The Bourt will extend the privileges of Purdah to women, who, though not Purdah, are not accustomed generally to appear before the public.

In this case a native woman not strictly entitled to Purdah privileges was brought into Court in a palki to give evidence. April 4, 1864.

Eglinton on behalf of the plaintiff contended that she ought to leave the Palki. To allow female witnesses like the lady in question to remain in her Palki while giving evidence, was to debar the Court from the advantage of observing the demeanour of the witness, besides opening the door to great deception and fraud.

Woodroffe for the defendant contended that the witness was entitled to the privilege she claimed. To compel ladies of this kind to leave their Palkis, and give evidence in open Court, would be tantamount to depriving the Court in many cases of their testimony.

Levinge J. said the question was, whether a woman who was not a Purdah woman, nor yet one always accustomed to appear in public, was entitled to the privilege of remaining in her Palki. He thought she must be considered so entitled. To hold otherwise would be to discourage female witnesses from attending to give evidence in Court—a state of things which was highly undesirable. The lady might remain in her Palki.

Ramrutton and Goberdhone Doss *vs.* The Oriental Inland Steam Navigation Company "Limited."

In the event of a defendant neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence, and should it appear desirable that a written statement should be put in, the case will be adjourned for that purpose at the expense of the defaulting party.

Graham with *Lowe* for Plaintiffs.

Eglinton for Defendants.

In this case which was one of a complex character the Defendants had put in no written statement. May 4, 1864.

Peterson J.—This is a case which has cost the country at least three times the amount in dispute. It is however an important case not only with regard to the question of fact, but also as to a point of practice. The Defendants, though they have had every opportunity to put in a written statement, have neglected to furnish one, and have thereby put the Plaintiffs to great trouble. In future when one of the parties to a suit neglects to put in a written statement, I will put him into the box and examine him as to the grounds of his defence. To the statement so made he will in all cases be confined, and if on examination, the Court shall be of opinion that a written statement is desirable, I will adjourn the case for that purpose at the expense of the defaulting party.

Macnair *vs.* Hogg. (Administrator of John Law Turnbull, deceased.)

In a suit to set aside a settlement, two accountants were employed at the Plaintiffs' instance, and not by order of Court, to examine the settlor's books and give evidence. Held that the investigation being most useful to the Court, and adapted to the ends of justice, the Taxing Master was right in allowing their expenses.

The Advocate General on behalf of the defendant moved that the Taxing Officer of the Court be directed to review his taxation of the plaintiff's costs as respected the sums of Rs. 1,500, and Rs. 200, allowed by him as payments to two Accountants. It appeared that the object of the suit was to set aside a settlement, made by the late John Law Turnbull in favor of his family, on the ground that he was in Insolvent circumstances at the time it was executed, and that the settlement was fraudulent and void as against creditors. In order to prove the state of his affairs, two Accountants were employed to examine his books, and give evidence. One of them was examined at the hearing, and Mr. Justice Morgan, before whom the suit was tried, made a decree setting aside the deed, and directing payment of the costs out of the estate of Mr. Turnbull. Upon the taxation of these costs, the Taxing Officer allowed the two sums in question as payment properly made. The Advocate General contended that upon the English authorities it was clear that the expense of a witness qualifying himself to give evidence, was not allowable as costs between party and party, and in support of this proposition he cited *Severn* vs. *Olive* 3 Brod. and Bing. 72. *Gravall* vs. *Attwood* 21 L. J. Q. B. 215. *Small* vs. *Batho* 21 L. J. Q. B. 254.

May 23, 1864.

Graham, for the plaintiff, contended that the sums properly formed part of the plaintiff's costs of the suit. The all important question in the suit was the state of Mr. Turnbull's affairs at the time the deed was executed, and this could only be ascertained by Accountants examining the books and accounts which were numerous and complicated.

Macpherson J.—This is an application that the Taxing Officer be directed to review his taxation of the plaintiff's costs as respects two sums, one of Rs. 1,500, and one of Rs. 200, allowed to Mr. Burgess and to Mr Bonwood, who are employed to investigate certain accounts, and to give evidence as to them at the hearing of the suit. There is no doubt that the expense of preparing or qualifying a witness to give evidence is not usually allowed in an ordinary case, *Severn* vs. *Olive* 3 B. and B. 27, *May* vs. *Silby* 1 Dowl. N. S. 701, *Gravatt* vs. *Attwood* 21 L. J. Q. B. 215, *Small* vs. *Batho* 21 L. J. Q. B. 254.

But the decisions are not invariably consistent, nor do they always follow the same principle. We find that the expenses of successful searches for pedigree are allowed, *Johnson* vs. *Lawson* 2 Bing. 341: so also are the costs of a witness called to translate and explain old records, and to give evidence on them, as an antiquary, *Bastard* vs. *Smith* 10 A. and E. 213. In the latter of these cases, both of which have some bearing on the one now before me, Lord Denman remarked that it might perhaps be said that the judge should have been able to translate and explain the record to the jury, adding "but it is at all events convenient that such a person as Mr. Doven should be present to do so."

The case I have to deal with, however, is on a different footing from any of those which have been referred to, owing to the objects for which, and the peculiar circumstances under which, the suit was instituted. The plaintiff, a creditor of one John Law Turnbull, deceased, sued on behalf of himself and all other the creditors of the deceased, the Administrator General as representing the estate of Turnbull, and the trustees of a deed of settlement executed by Turnbull, to have that deed set aside as void by reason of Turnbull's having been insolvent at the time he executed the deed. The Court set aside the deed as prayed, and ordered the costs of all the parties to the suit taxed according to scale No. 3, to be paid by the Administrator General out of the estate of the deceased.

The whole question turned upon the fact whether Turnbull was or was not solvent at a certain date; and, he being dead, there were no possible means of ascertaining the true state of his circumstances, except by a careful examination of his books of account. These books were carefully examined by the Accountants whose expenses it is now sought to disallow; and it was only by reason of their having been so examined, and by reason of the attendance in Court of one of the Accountants Mr. Burgess, that the Court was enabled to understand the accounts, or to judge of the solvency or insolvency of Turnbull. The expenses of a plan used for the information of the Court at the trial have been allowed, *Holmes* vs. *Holmes* 2 Bing. 75, and, on the same principle, it appears to me that the expenses of statements of

accounts prepared, and used, for the information of the Court, when their being so prepared and used, is absolutely essential to the due understanding of the question at issue, and is in fact the main evidence in the case, ought also to be allowed. Moreover this suit is in fact a suit brought for the benefit of the estate of the deceased, by a creditor suing on behalf of himself and all other creditors; and if there had been an express order of the Court, that all costs as between solicitor and client, should be paid out of the funds in the hands of the Administrator General, the directions would have been in accordance with what is commonly ordered in regular creditor's suits (see the cases collected in William's Executors (5th ed.) p. p. 1847, 1848, &c.) The Taxing officer is not wholly without discretion so long as he introduces one distinct rule as principle; and in this case it seems to me, that in allowing these costs as between solicitor and client, he was acting quite in accordance with the spirit of the rule usually followed by the Court in similar cases.

Finally, it appears to me that looking at the matter in another point of view, I ought not to interfere with what has been done by the Taxing officer. The question of costs in this Court is now regulated by Sec. 188 of the Civil Procedure Code; and I am not prepared to say that the Courts in England are necessarily to be strictly followed in every instance. Section 188 declares what charges are to be allowed under the head of "costs," and amongst others mentions "expenses of Comissioners on investigations into accounts." Here no doubt the investigation was not made by order of the Court. But had it not been made when it was, probably a Commissioner would have been appointed by the Court to make the investigations, or the plaintiff would have failed in his suit.* As the investigation made at the plaintiff's instance, although made without the order of the Court, was most useful to the Court, and essential to the ends of justice, I think that under Section 188 of the Civil Procedure Code, if under no other rule, the Taxing officer was justified in allowing the expenses of the Accountant.

As I am of opinion that some allowance was rightly made, the question of the amount allowed is not open to discussion before me.

I may add that I have consulted Mr. Justice Morgan, by whom the suit was heard, as regards the necessity for the employment of the Accountants. He is of opinion that the affidavit which declares that it was absolutely necessary does not go at all too far, and that the investigation of the accounts by Mr. Burgess, and his attendance at the trial to explain them, were absolutely essential.

Application refused accordingly.

RAMDHONE GHOSE *vs.* ANNUNDCHUNDER GHOSE.

The members of a Hindoo family, jointly and severally interested in a certain House and premises, covenanted for themselves, their heirs, and executors that the said House and premises should never be partitioned, except by the unanimous consent of the contracting parties. Held by the lower Court, and confirmed on appeal, that whether valid or not as regards parties representatives by purchase, the covenant is binding upon those who are personally parties to the deed.

The Advocate General with *Newmarch* for plaintiff.

Graham with *Woodroffe*, for defendant.

Levinge J.—This is a suit instituted for a partition of the premises mentioned in the pleadings. There is no dispute as to the title of any of the parties to their shares. The defence set up by the defendants, who are five in number, and represent the whole property, is, that the plaintiff and defendant being a joint undivided family, mutually agreed and consented by deed under their hands, dated the 22nd April 1862, that the property should not be partitioned, except, to use the words of the deed, " by unanimous consent of themselves or their heirs, &c.," and the question the Court is called on to decide is, whether this deed is binding upon those who executed it.

Feb. 23, 1864.

Two objections are urged by the plaintiff who seeks a partition; first, that the deed is absolutely void as establishing a perpetuity; second, that the deed is bad for want of consideration. The deed has not been impeached on the ground of any fraud or irregularity.

It seems to have been entered into, and executed, by all the parties, before the plaintiff Sreenauth and four of the defendants had an interest assigned to them in the premises. But they may have entered into a binding contract to purchase the shares they now respectively hold.

There can be no mistake as to the terms or meaning of the deed of agreement; it effectually establishes a perpetual joint estate, incapable of being divided, except with the unanimous consent of all the parties interested, and they are now before the Court. So determined were the parties to make a binding arrangement, that on the same day they executed an agreement, covenanting that they would not contribute, directly, or indirectly, to any proceedings to bring about a partition.

On the first objection, *viz.*, that the deed is void as creating an estate in perpetuity, the deed has been argued on both sides, as having practically that effect.

It appears to me that it is now settled law, that a Hindoo has the power to tie up his property, and prevent a partition of his estate. In *Luckunchunder Seal* and *Koroonamoye Dossee*, reported in Boulnois, Vol I p. 210, the subject is fully discussed, and there the Court held that a devise by a Hindoo creating a perpetuity was invalid; but it is to be remarked that this Court, in deciding that case, admitted, that they were not referred to any rule or authority of Hindoo Law which affected the question, nor had the Court been able to find any, and therefore they felt themselves constrained to apply the doctrine of the English Law against perpetuity. This decision was reversed on appeal by the Judicial Committee (see *Sonatun Bysack* vs. *Sreemutty Juggutsoonderry Dossee* 8. Moore's Indian Appeals 166); and although it will be seen on a careful perusal of that case, that the Court do not in terms say that a devise creating a perpetuity is valid, yet they hold that the extent of the power of a Hindoo testator, is to be regulated by the Hindoo law alone. It being admitted that there is not to be found any law, prevalent or recognizable among Hindoos, restricting the power of a testator to devise his estates in perpetuity, why should the Courts of Law interfere to control that power, and introduce

the peculiar doctrine of the English law against perpetuities, as applicable to Hindoos? It is clear that this technical rule does not prevail among Hindoos and in some European countries. The Judicial Committee have declared that the Wills of Hindoos are to be regulated by Hindoo law alone, and therefore ought to be considered by this Court, without reference to the doctrine of the English Law against perpetuities. Any doubt on the matter seems now to be put at rest by a decision of this Court, delivered by the present Chief Justice Sir Barnes Peacock, in the case of *Gobadhone Bysack* vs. *Shamchund Bysack* in Oct., 1861. The decision does not appear in any regular reports, but a report of the case appeared in the *Englishman* newspaper of Oct. 26, 1861, and has been referred to in argument, and its accuracy has not been questioned. That case was a branch of the suit already mentioned, as heard on appeal before the Privy Council, arising on the construction of the will of *Ramdoss Bysack*. The point to be decided by the Court was, whether, under the terms of the will, the parties were entitled to a partition of the *corpus* of the estate, or whether their rights were not restricted to a division of the surplus profits only. The Chief Justice in giving judgment, after reviewing the authorities I have mentioned, and the passage to be found in Sir F. Macnaughten's work p. 327, says—"If the Hindoo law contains no rule against perpetuities, we must hold that a devise is not by that law invalid, upon the ground that it tends to create a perpetuity. Then, why are we to resort to some foreign law which disallows perpetuities? There is no rule of Hindoo law which invalidates a conveyance, or a gift *inter vivos*, upon the ground of its creating a perpetuity. Then, why are to seek for some foreign law to render void a bequest contained in a will of a Hindoo, and which is valid according to Hindoo law? Imagine what a system of laws we should have to administer, if we were told that it was the Hindoo law modified by the policy and principles of the English law." Further on the Chief Justice adds—"If we are to give effect to the will of Hindoos according to the light and policy of the English law, the intentions of nearly every testator will be frustrated. The Judicial Committee appears to us to have determined the question of perpetuity. That question was raised in the suit brought by

Juggutsoondery. Sir J. Colville, in his judgment in that case gave effect to the rule against perpetuities, but the Privy Council did not expressly refer to the question; but, reversing the decree, commenced by stating that it is not improper to observe that, with reference to the testamentary power of these dispositions of Hindoos, the extent of this power must be regulated by the Hindoo law. We hold that the testator had power to prevent the partition of his estates, and to give his sons or their heirs a power of dividing or disposing of the surplus proceeds only." It has been argued by the Advocate General that the parties cannot be allowed to contract themselves out of the law or the jurisdiction of the Court, but it has been shown that it is perfectly legal to create a perpetuity, either by will, or deed.

The sole remaining question I have to decide is, whether the deed can be avoided by the parties who signed it, on the allegation that it lacks sufficient consideration to support it. I think that this objection must wholly fail, as in my opinion there is ample consideration expressed in the face of the instrument. Besides, I think that whole property in one united family and a common estate, would be ample consideration to support the deed, as by this means a mutual use of the whole property is established. Being a joint and undivided family, the making a deed prompted by a mutual wish to effect the continuance of the family as a united family, ought to be held sufficient consideration, there being mutual promises and mutual obligations imposed on each party to the deed, supposing that there is no consideration shewn for this family, and I am not aware that any would be necessary in the absence of any express provision in the Hindoo Law on the subject.

I have been referred to *Colebrooke's Digest*, Vol 2, but I have been unable to find any passage that supports plaintiff's contention. By the common law of England, a consideration was not essentially necessary to the validity of a deed; the solemnity of the act carrying with it sufficient evidence of the consideration, and why should the Hindoo law require express consideration to be shewn to support a deed, entered into by a joint family to secure the entirety of their estate? It lies on

the plaintiff to shew that the law requires it. After this deed has been acted on, it would be inequitable to allow any of the parties to it to break loose from its provisions, without the consent of others. How far the heirs or representatives of any of these parties may avoid the deed is a matter with which I have nothing to do.

Against this decision the Plaintiff appealed.

APPEAL.

RHAMDHONE GHOSE *vs.* ANUND CHUNDER GHOSE.

The Advocate General with *Newmarch* for (Plaintiff) appellant.

Graham with *Woodroffe* for (Defendant) respondent.

Norman C. J.—This is an appeal from a decree of Mr. Justice Levinge. The appellants and respondents (who were respectively plaintiff and defendants in the original suit) are the joint owners of certain premises in the town of Calcutta, and the suit was instituted for the purpose of obtaining a partition of those premises. May 16, 1864.

The appellants are interested in the property in the following proportions: viz, Ramdhone has an $\frac{18}{60}$th. share; Shreenauth a $\frac{2}{60}$th share, and Greeschunder a $\frac{12}{60}$th share. Of the respondents Annundchunder has $\frac{18}{60}$ths, Kallykissen has $\frac{2}{60}$ths, Khetturchunder $\frac{3}{60}$ths, and Nobinkissen, and Jeebunkissen $\frac{2}{60}$ths each. In all, $\frac{27}{60}$ths or $\frac{9}{20}$ths are vested in the respondents, the remaining $\frac{33}{60}$ths or $\frac{11}{20}$ths belonging to the appellants.

In opposition to the appellants' claim for partition, the respondents set up an agreement, executed on the 22nd of April 1862, by all the persons who are the parties to this suit, by which agreement they professed to bind themselves never to divide the joint property.

The following are the material parts of this agreement:—

1.—"We Ramdhone Ghose, Anundchunder Ghose, and Greeschunder Ghose, each of us a one fifth shareholder of the house, premises, land, &c. No. 2 Cossey Ghose's Lane in Simlah, in Calcutta,

and we Khetterchunder Ghose and Sreenauth Ghose, sons of the said Ramdhone Ghose, and I, Greeschunder Ghose, in my second capacity as son and one of the heirs of the said Ramdhone Ghose; also we Kallykisto Ghose, Nobinkisto Ghose, Jeebunkisto Ghose sons of the said Anundchunder Ghose, do hereby agree, covenant, and bind ourselves, our heirs, executors, &c., in manner following, that is to say :—

2.—"That with the view of preserving intact the family dwelling house and premises with the lands, &c., No. 2, Cossey Ghose's Lane, in Simlah, in Calcutta, left by the late Cosseynauth Ghose who died intestate, we hereby agree that the said family dwelling house and premises with lands, &c., thereto appertaining, shall continue in our joint undivided occupation as at present, and shall not be subject to a division and partition, except by the unanimous consent of all the aforementioned contracting parties.

3.—"That the possessions now held by us, or which we may hereafter hold with unanimous consent of the parties to this agreement in the said family dwelling house, and premises with lands, &c., shall remain undisturbed.

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6.—"That should it at any time happen that the said family-dwelling house and premises with lands, &c., are subjected to a division and partition by the unanimous consent of ourselves or our heirs, &c. as aforesaid, the said Greeschunder Ghose or his heirs, executors, &c., will be entitled to take possession of his or their one-fifth share therein, as conveyed by the aforesaid deed of gift, without payment of any further sum than Company's Rupees five hundred, which we now fix as the value.

8.—"That in the event of any dispute arising between us in regard to the occupation, use, and enjoyment of the said premises, it is hereby agreed that no new arrangement connected therewith can be made by any of us without the unanimous consent of all the parties to this agreement, and further, that in the event of any one of us introducing strangers into the premises, either as servants, or otherwise, and such introduction being opposed by any one of the

parties to this agreement, his opposition shall be held as valid as if it had proceeded from us all, and the nuisance shall be immediately put down."

On the same day, and with special reference to a suit for partition of this property, which was then pending at the suit of persons who then had, but have not now, shares in the joint property, the following instrument was executed by the parties to the first agreement:—

"We the undersigned, Ramdhone Ghose, Annundchunder Ghose, Khetterchunder Ghose, Nobinkisto Ghose, Sreenauth Ghose, Greeschunder Ghose, and Jeebunkisto Ghose, do hereby agree and covenant that the agreement this day entered into by us under which the house, premises, lands &c. No. 2, Cossey Ghose's Lane, Simlah, in Calcutta, shall be indivisible, except by the unanimous consent of, each, all, and every one of us, shall be held to be void, and not binding, in the event of the said house, premises, lands, &c., being subject to a division and partition in regard to any portion thereof at the instance, suit, or otherwise, of any other co-sharer of the said house, premises, lands &c., who are not parties to this agreement.

2.—"It is, on the other hand, agreed that none of the parties to this agreement shall, directly, or indirectly, contribute his or their aid, either with money, advice, or otherwise, towards bringing about a division of the said property, provided that nothing therein agreed upon shall bar any party or parties to this agreement from giving, when lawfully called upon to do so, his or their evidence, &c., in a Court of Justice, in such manner as he, or they, may conscientiously believe to be right and proper."

At the time these documents were signed, the respondents, Khetterchunder, Kallykissen, Nobinkissen, and Jeebunkissen, and the appellant Sreenauth, were not in possession of any share in the property in question, but they are the sons, some of them of Ramdhone, and others of Anundchunder. The shares which these sons now hold, are shares acquired by them, subsequent to the 22nd of April 1862, from the other original co-sharers, who did not join in the agreement.

The learned Judge has held that the agreement is valid and binding on all the parties to it, and that it is a bar to any claim for partition made by any of them. He has accordingly dismissed the suit.

In appeal, it is urged that the agreement is void as being against public policy, inasmuch as it tends to create a perpetuity, and inasmuch as it is an attempt on the part of the parties thereto to impose on their estates and interests in the property, an incident which is inconsistent with, and repugnant to, the nature of those estates and interests. It was also contended that the agreement was no defence to the suit, because it was not executed by all the persons who at the time of its execution held shares in the joint property, certain of those who signed not being then sharers, and having signed merely in their character of sons of sharers.

As regards this last objection, we are of opinion that it cannot be supported. It is true that some of the existing sharers did not join in the agreement, and that certain of those who executed it, were not in actual possession of any share in the property, and that they described themselves in the agreement as sons of Ramdhone and Anundchunder respectively, and Greeschunder expressly professes to contract as son of Ramdhone. But it appears to us to be quite clear that those who so described themselves as sons, did not do so with the object of binding themselves only as sons, or as regards only such rights as they then had. They do not agree that the interests, of which the parties to that instrument were then jointly possessed, should continue to be held by them as a joint family property. The object is that the family dwelling-house and lands should continue an undivided property as at that time (Sec. 2)—that for the purpose, the possessions held by the said parties, or those which they should hereafter hold in the said family dwelling-house and premises, should remain undisturbed (Sec. 3). The second agreement, which has reference to the shares of the other co-proprietors, is perfectly general. The parties do not describe themselves as contracting in any particular capacity. They agree that none of the parties to that agreement shall directly, or indirectly, contribute his or their aid, either with money, advice, or otherwise, towards bringing about a

division of the property. This is a personal contract made expressly with reference to the shares then vested in other members of the family. It is thus evident from the whole tenor of the agreement, that the intention of all the other parties to the instrument was that all should be bound, not simply with reference to any rights which they had in possession, or as sons and expectant heirs, but that they should bind themselves absolutely, and with reference to the entire joint property. And if they had such an intention, we see nothing which would prevent their binding themselves, either with reference to any shares of which they were then expectant heirs, or any share which they might thereafter acquire in the property in question. Had this question been one of English Law there is nothing which would have prevented the parties from entering into a contract, binding themselves with reference to such interests, (compare *Coote vs. Field* 15, Q B. 460.) By the second contract, they bound themselves not to seek to bring about a partition in respect of the shares then vested in the other shareholders, and the subsequent acquisition of such shares did not justify them in breaking their contract.

It is contended that the agreement is wholly void as being against public policy. But in the view, which, as it will be presently seen, we take of the effect of the agreement, so far as this suit is concerned, it will be unnecessary for us to enter at length upon those questions. We desire however, not to be understood, as being prepared, without much further consideration, to assent to the proposition, that according to the law of property amongst Hindoos, no deed can be invalid by reason merely of its tending to a perpetuity, or by reason merely of its attempting to attach to an estate an incident inconsistent with, or repugnant to, the nature of that estate, a doctrine which, pushed to its ultimate consequences, would have the effect of enabling persons to legislate by deed or will with respect to property, to annex new incidents to it, and thus alter the law as applicable to the same, and subject it for all time to special laws. We certainly do not find that anything of the sort was decided, by the Judicial Committee of the Privy Council in the case of *Sonatun Bysack* vs. *Juggutsoondery Dossee*, 8 Moore's Indian Appeals p. 66. And we

may observe that such a doctrine is repugnant to the primary notion of that nature of property, which man is capable of acquiring in any thing which he has not created for himself, *viz.* a right of appropriation and use for himself, and simply of transferring it to some one person or many persons in succession, capable of accepting it when he has done with it.

But it is not necessary to discuss that question now. Our decision on the present appeal turns on a much narrower point. For we consider that the agreement may be treated, as an agreement binding the parties to it, as to the manner in which they are mutually to enjoy their joint property. It may be that if the parties to the suit were not all personally parties to the agreement, they would not be bound by the covenant not to divide the estate, and that as against any stranger acquiring a share in the joint property, the agreement might be held to be worthless. Indeed, we are by no means prepared to say, that the whole agreement will not be determined, if the interests of any of those who are parties to it, pass to a stranger, either by death, or alienation.

Be that as it may, we are of opinion that persons jointly entitled to lands, may as amongst themselves, come to an agreement as to the manner in which they will mutually enjoy their property, and that such an agreement will be binding upon all the immediate parties thereto. To that extent the agreement may operate, even if it contemplate a further object to which the Court would not give effect, because the good part can be separated from the bad. *Mallan* vs. *May* 11 *M.* and *W.* p. 625.

There is on the very face of the present agreement, ample consideration to support it, in the mutual covenants and concessions made by the parties, consideration of the same sort as that which supports a composition deed amongst creditors, or an ordinary partnership deed. We see no equity which any of the parties to this agreement can have, to entitle them to come to this Court, and ask to be relieved from their contract—no grounds upon which they can call upon us to help them to break their own contract deliberately entered into.

The decision of the learned Judge who tried the suit was also appealed against, on the ground that it contained no express finding, as to the effect of certain acts of the parties subsequent to the agreement. We find no sufficient evidence, however, of any waiver or abandonment of the agreement by the respondents. And as we consider that the agreement is still valid and binding as among the parties to this suit, we dismiss the appeal, confirming the decision of Mr. Justice Levinge with costs to be taxed on Scale No. 2.

RUJJOMONEY DOSSEE *vs.* SHIBCHUNDER MULLICK.

A Hindoo father and son lived joint in food and worship, but separate in estate. Held that the widow of the son has no legal claim upon the father for maintenance.

Graham with *Lowe* for the plaintiff.

Woodroffe for the defendant.

This was a suit instituted by the widow of a deceased son (a Hindoo) against her father-in-law for maintenance. June 28 1864.

The plaintiff was the daughter of one Rajnarain Pyne, and the widow of Konnyloll Mullick, the son of the defendant Shibchunder Mullick whom she sued for maintenance.

The following issues were raised :—*First*, whether the plaintiff's husband having been joint in food and worship with the defendant, who is her husband's father, the plaintiff is entitled to maintenance. *Second*, whether, the plaintiff having left her father-in-law's house, that right continues to exist.

Shibchurn and Konnyloll his son were said to have been joint in food and worship, but it was not suggested that they were joint in estate; and in fact it was stated that they carried on separate business as ship's Banians. About a year after the death of her husband, the plaintiff, who was then about ten years old, went to reside at the

house of defendant, and remained there about three months, when she left, as she said, because she was ill-treated and beaten by the wife of her deceased husband's brother, Kooamoney Dossee, and by Gobindomoney Dossee—she also complained that they gave her food only once a day, and no *pan*; she was not ill-used by any one else, and did not complain to Shibchurn, but returned to her mother's house. She said the chief cause of her leaving was that she had only one meal a day; that she wanted *pan*; and that widows of her caste eat *pan*.

Norman C. J.—I am not satisfied on the evidence that there has been any real cruelty to the plaintiff, so as to render it impossible for her to live in the defendant's house. She appears to shrink from the severity and the discipline which Hindoo Law and custom impose on widows in her rank of life.

According to Hindoo Law, probably the plaintiff should be maintained in the house of her father-in-law, who ought to find her in food and raiment. But when the father and son are not joint in estate, the maintenance of the son's widow appears to be a mere moral duty in her father-in-law, to the performance of which he is not compellable by law. The absolute power of a father, as master and head of the family, over property acquired by himself, his right to distribute it at his pleasure, and to keep and reserve what he thinks fit for himself, is asserted in the most distinct manner in numerous texts—Colebrooks Digest Book V. Cap. 1. Sect. 2. XXIII. XXIV. XXV. and XXV. and Chap. 2. p. 88. In page 90 the commentator, Jagannatha, treats the maintenance of a family out of a man's own wealth as preceptive merely, and says at page 88, that a father slighting such precepts, commits a moral offence, but incurs no civil penalty. A son's widow cannot have larger legal rights against her father-in-law than her husband would have had if alive, and such husband could not have compelled his father to give him any share of his property.

The present case is wholly distinguishable from those where an heir takes property, subject to the obligation of maintaing persons

excluded from inheritance, out of the estate of the deceased proprietor, or whom the deceased proprietor was morally bound to maintain. In such cases Hindoo Law seems to annex the duty as a burden on the inheritance in the hands of the heir, and the right of the party claiming maintenance, appears to be a legal right, analogous to a right of property. Menu, Chap. IX. 201, 202, Shamachurn's Vyavastha Durpana, page 315; Dayabhaga Chap. V. Sec. 11; Chap. XI. Sec. I. $ 49, Macnaughten's Hindoo Law Vol. 2 pp. 105, 106, 116, 117, 119. *Raisham Bullub* (appellant) *vs. Prankissen Ghose* (respondent.) 3 Select Reports p. 33. 2. Strange's Hindoo law, 297, and Mr. Colebrooke's remark, ibid, 304.

In a case in Macnaughten's Hindoo Law, Vol. 2 page 118, it was considered that the widow of a son who had received from her father his share of the ancestral property in his life time, could not in a Court of law claim maintenance from the father of her husband. And in case No. 4. Macnaughten's Hindoo Law Vol. 2. p. 111. it was held that a son's widow had no legal right to alimony, or money allowance, for maintenance from the widow of the father. I think that the principle of these last cited cases applies to that now before me, and that accordingly the plaintiff is not entitled to a decree against her husband's father for a money allowance, and consequently she must accept maintenance in such shape as the defendant chooses to give it to her, and the defendant has a right to say that he will not maintain her unless she resides in his house.

This appears to be contrary to a case decided on the 10th August 1852—Sudder Dewanny Adawlut Reports p. 796, but the distinction above alluded to appears to have been overlooked by the Sudder Court though apparently not by the Lower Court. In the case of *Collydossee Dossee* vs. *Chunder Suker Bistoo,* in which Sir Mordaunt Wells made an order for maintenance, the point was apparently not argued.

Dhunput Singh Dogare *vs.* Shaik Golam Hadee.

Interest at the stipulated rate, no matter how usurious, will be awarded down to decree. The rate at which subsequent Interest is to be awarded is entirely in the Court's discretion. If a Plaintiff has contracted to receive interest at 12 per cent only, that rate will be carried down to decree, but should he have contracted for a higher rate, 6 per cent only will be allowed.

Hyde for the plaintiff.

The Defendant was not represented.

This was a suit to recover the principal and interest upon a Hautchitta signed by the Gomastah of the Defendant. The Hautchitta carried 18 per cent as the rate of Interest upon its face. Aug. 9 1864.

Levinge J.—In this case I pass a decree for the principal with interest at 18 per cent up to date of decree, and subsequent interest up to payment at 6 per cent.

I wish that there may be no misunderstanding as to the rule adopted with regard to decreeing interest. I consider I am bound to award the rate of interest the defendant has specifically contracted to pay, down to date of decree, no matter how high or exorbitant that rate may be. The language of the 2nd section of Act XXVIII. of 1855 is clear and peremptory, and leaves no discretion. It says, "In any suit in which interest is recoverable, the amount shall be adjudged by the Court at the rate (if any) agreed upon by the parties." No doubt this section was passed to enable a plaintiff to enforce his contract, and to lay down a strict rule for the guidance of the Court passing the decree. But after date of decree the rule alters, and a latitude is given to the Court, so that it may exercise its discretion as to subsequent interest.—This is just, as the contract is suspended and the remedy on it gone. A new right has sprung up, *viz.*, under the decree, in which all the rights of the plaintiff are merged; and it never could be intended

that under a decree the Court was bound to award subsequent interest at the contract rate, possibly of 40 or 50 per cent. The 3rd Section declares "that whenever a Court shall direct that a judgment shall bear interest, it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such rate as the Court shall think fit," leaving the Court the widest discretion. The rule I have laid down as to the exercise of this discretion is this, and I think it fair and equitable. If I find that a plaintiff has been dealing usuriously, or gets awarded on his contract as to interest a high rate, then I only decree 6 per cent, on the amount of judgment, although the Court has power to decree on the principal sum alone. But if I find that the plaintiff has contracted to receive a rate not exceeding 12 per cent, I allow that rate to be carried on down to realization. This is the rule I have always adopted, and I think it is fair as well as strictly legal. I may remark that in the decrees on the Appellate side of the High Court and throughout the Courts in the Mofussil, where interest on the amount decreed is awarded, the Court rate is invariably awarded at 12 per cent. I do not consider that the 10th section of Act XXIII of 1861 means to repeal the above sections I have quoted, and give the Court a discretion as to the rate to be adjudged from date of suit to decree, when the parties have specifically contracted, the one to pay, the other to receive, a fixed rate, but merely to give the Court the power to award interest after date of suit in any ordinary action for money due, and where there has been no contract. If Act VIII. of 1859 is to be amended as proposed, it might be well to consolidate the law with respect to decreeing interest.

HOSSEIN IBRAHIM BIN JOHUR *vs.* MUTTYLOLL.

Insurance—Sea worthiness—Abandonment—Total loss.

The Advocate General with *Newmarch* for the plaintiff.

Graham with *Woodroffe* for the defendant.

The plaintiff in this suit sought to recover Rs. 15,000, being the amonnt due on a policy of Insurance granted by Aug. 2 1864.

the defendant on the block of the ship *Fuzzel Kurreem.* The policy was a time policy, from noon of the 25th April 1862 to noon of the 25th July 1862. The ship sailed on a voyage from Calcutta to Madras: she never reached the latter place, but arrived at Moulmein in a damaged and leaky condition, and was there abandoned as a total loss.

Macpherson J.—I shall not refer to the written statements put in by the parties, nor to the issues fixed more than a year ago, as the issues to be tried, further than to observe,—and I might make the same observation as to many other suits which have come before me,—that neither the written statements, nor the issues fixed, raise fully or accurately, what are certainly the true questions to be determined in the suit. These questions are

1. Was there any warranty of sea-worthiness at the time the Policy attached?

2. Was the ship seaworthy when the policy attached, and if unseaworthy, was it by reason solely of that unseaworthiness, that the *Fuzzel Curreem* arrived at Moulmein in the condition in which she was when she reached that Port?

3. Had the plaintiff a right to treat her as a total loss and abandon her as he did?

4. What was her value at the time she was insured?

As regards the first of these issues, it is quite clear that there was no warranty of seaworthiness. This is conclusively settled by *Thompson* vs. *Hopper*, 6. Ell. and Bl. 172, *Fawcus* vs. *Sarsfield* 6 Ell and Bl. 200, *Michael* vs. *Tredwin*, 25 L. J. C. P. 83, and *Gibson* vs. *Small* 4 H L. C. 353.

But although there was no warranty of seaworthiness, still according to the decision of the Court of Queen's Bench, on the 4th plea in *Fawcus* vs. *Sarsfield*,—if the vessel at the time of insurance was unseaworthy, and was sent to sea in that state, and it

without her encountering any more severe weather than is usual and ordinary in the voyage on which she sailed, or than a ship reasonably fit for the voyage could have encountered without damage, the necessity for her putting into Moulmein, in the state in which she arrived there, arose exclusively from her having been unseaworthy when she sailed,—then, as the loss arose from the vice of the subject of insurance and not from any of the perils insured against, it cannot be cast upon the insurers. And this is so even although the unseaworthiness was not within the knowledge of the assured.

Now there is no doubt that Captain Handley considered that the *Fuzzel Kurreem* was staunch and seaworthy, and "an unusually sound good ship for her age." And in this opinion he is supported by the evidence of a person who superintended certain repairs done to the vessel in the Caledonian Dock in the end of 1861,—by the evidence of Captain Jeffries, who sailed in the ship as Commander on the voyage out of which this suit arises,—and by the evidence of the pilot who piloted her to sea and saw nothing wrong so long as he was on board, and of Captain Millard, who examined her at Moulmein. Nevertheless the conclusion at which I have arrived, after a full consideration of all the evidence before me, is that the *Fuzzel Kurreem* at the time this policy attached was quite unseaworthy; that is to say, that she was not fit, in the degree which a prudent owner uninsured would require, to meet the perils of the service she was about to be engaged in.

It is clear on the face of Captain Handley's evidence, that before she was docked, there was a great deal of unsound wood about the ship which required removal and replacement, and he recommended repairs which he says would have cost Rs. 20,000, or 25,000, or more. Certain repairs were executed in consequence of his advice, but as will presently be seen they were repairs which did not cost 15,000, not repairs which cost 25,000. Captain Handley surveyed the ship after she came out of Dock, and declared the repairs done to his satisfaction. But the making this declaration can be explained only in one or other of two ways: either Captain Handley made that declaration on a very imperfect examination of the ship, or he

originally made a great mistake in recommending repairs so extensive and costly as those which he says he ordered. The former appears to me the more reasonable explanation, and I do not doubt that the repairs recommended by Captain Handley, and which were in fact necessary to make the ship seaworthy, never were fully executed. I think that Captain Handley's survey subsequently to the vessel coming out of Dock must have been superficial, and based upon the idea that of course all that he had desired to be done had been done. The previous history of the ship, and her conduct on this voyage as shewn by her log, furnish facts which speak for themselves, and lead, as it appears to me, necessarily to the conclusion, that the ship was unseaworthy when she commenced her voyage.

The *Fuzzel Curreem* is an old American ship, built of oak at Diexbury in 1842. She was originally called the "George Hallet" and having been sold at Mauritius, came (under what circumstances does not exactly appear) into the hands of a Native, who at or about the time the ship was bought by the plaintiff, was in Jeddo. She lay in the port of Calcutta for some months during the summer of 1861, and about the end of the rains she was chartered by the present plaintiff for a voyage to Muscat. A cargo was put on board of her, but she was found to be leaking so excessively before she ever started on her voyage at all, that the cargo had to be relanded, and the vessel was docked for repairs. The Captain then tried to raise money on bottomry, but could not succeed in his attempt. The plaintiff lent him various sums amounting in all to about Rs. 8,000, for current expenses; but at last, being unable to get money for the necessary repairs, the Captain had the ship put up to Auction by Mackenzie, Lyall and Company, the Auctioneers, when she was bought by the plaintiff for Rs. 7,500.

Having purchased her, the plaintiff got her surveyed by Captain Handley, who recommended the repairs already referred to. Certain repairs were executed, and the ship came out of Dock, when Captain Handley again surveyed her, and gave a report declaring that she had been repaired to his satisfaction, and was a good

insurance risk. She then proceeded on a voyage to Madras and back, returning to Calcutta on the 1st of April. During that voyage nothing particular occurred, and she gave no special symptoms of unseaworthiness. This no doubt is a fact favorable to the plaintiff. But it is not to be forgotten that the weather in the Bay of Bengal is ordinarily very different in the month of January, February and March, from what it is in the months of May, June, and July; and that a ship which successfully performs the voyage during the former season is by no means necessarily strong enough to perform it during the latter. The *Fuzzel Curreem*, having returned to Calcutta, was loaded with a cargo chiefly of rice, and again despatched to Madras. Nothing unusual occurred, on her way down the river, and the pilot left her at the Sandheads on the morning of the 11th of May. According to the log, from which I take the account of what happened, the wind was then light and the weather fine and so continued till the evening of the 12th; when at 7 P. M. there was an "increasing breeze and hazy weather" and at 10 A. M. there was a "strong breeze and hazy weather" with a very heavy swell from S. W., "ship pitching heavily." On the 13th, the weather moderated and was fine, "with a heavy swell from S. W; made all possible sail; ship pitching heavily. Pumps attended to, crew employed as required." That night the breeze increased with a heavy head sea, the ship labouring much, and some of the sails were taken in.

The events of the next day, the 14th, are most important. In the early morning there was a strong increasing breeze with heavy sea; a heavy N. W. squall, which made it necessary to double reef the top sails and take in main sail, "the ship laboring heavily and making much water," then there were "variable winds with heavy squalls" and the pumps were carefully attended to. "At 8 A. M. the weather was more moderate; take out reefs of top sails. Heavy sea from S. W., ship laboring heavily, and causing her to make a good deal of water for the first time since leaving the port." Then we have the following entry: "1 P. M. fresh breeze and fine with a very heavy head sea, ship laboring heavily and making a great-

deal of water : in consequence of the ship making so much water, divided the crew into two watches, and kept one watch constantly employed at the pumps and kept her under easy sail." And at midnight "same weather throughout. Pumps kept constantly going." So that in fact within a few hours after the commencement of the first weather encountered, which can be called in any degree unusual, or other than such as would naturally and as a matter of course be looked for at that season of the year, we have this ship in such a condition that it was necessary to divide the crew into two watches, and to keep one watch constantly at the pumps, a state of things which continued until the vessel reached Moulmein. No doubt it is possible that a seaworthy ship may in the course of a gale of no long continuance, or of a sudden squall, sustain serious damage. But in the case of the *Fuzzel Curreem* nothing special, nothing in the nature of an accident occurred. It is clear that the leakage arose primarily from her general weakness, and her unfitness to carry such a cargo in any thing but smooth water. There was, as it afterwards appeared, no failure of any particular part of the ship, but a general failure throughout.

The voyage continued, and from the 14th May to the 28th, the weather seems to have been rough, but not such as is unusual, except, perhaps, on the 16th. From the 19th to the 28th it was fine, and we find it recorded that the decks were washed daily, which they would not have been, if the weather had been very bad. There seems however to have been a constant heavy swell, and the ship appears always to have labored heavily. From the 28th to the 31st there was a heavy gale : and it was during the continuance of this gale, that, on the 29th, finding the leak was gaining fast, that the pumps were beginning to bring up rice as well as water, and that the crew were becoming exhausted from constant work at the pumps, the Captain gave up all hopes of reaching Madras, and bore up for Moulmein. From the 31st May to the 5th of June, when the pilot came on board at the mouth of the Moulmein river, the weather was not remarkable.

The narrative given in the log book, is I have no doubt, substantially correct. The Captain swears that it is correct; and

so far as it relates to the weather encountered during the latter part of the voyage, it is corroborated by the Pilot and other persons then at Moulmein, who depose to there having been very bad weather outside shortly before the *Fuzzel Curreem* arrived. Captain Handley takes upon himself to say, that, notwithstanding the Log, he does not believe that the ship ever made water enough to keep the pumps going. But a more rash or idle statement it is difficult to conceive, seeing that as a matter of fact, admitted by the Captain and by every person who examined the ship, whether on behalf of the insurers, or of the assured, the ship, when she reached Moulmein, was in a most leaky condition, and was so strained and shaken, that she was unfit to proceed, either to Madras, or to Calcutta even in ballast, without having first received very considerable repairs. Even without any of the evidence which was taken at Moulmein, I think it clear that the *Fuzzel Curreem* was not seaworthy when she left Calcutta. But the evidence of the witness who saw and examined the vessel when she came in from sea places the matter beyond all question. Making every allowance for exaggeration, of which there has no doubt been a good deal on both sides, I consider it is proved by those witnesses that the ship had a great deal of decayed timber in her, and that she was leaky, and strained, and shaken, and started all over. The timber which was decayed in Moulmein could not have been sound in Calcutta; and it is difficult to understand how any ship can be seaworthy whose hull is composed chiefly, or to a very great extent, of rotten wood.

But although I find that the *Fuzzel Curreem* was not seaworthy, and was not in a fit state to be sent down the Bay of Bengal with a cargo of rice at that season of the year, it is impossible for me to say that the condition in which she was, when she reached Moulmein, arose exclusively from her being unseaworthy when she sailed. The weather she encountered was at times heavy and unusually bad (more particularly from the 28th to the 31st), and such as might have injured a seaworthy ship. I cannot therefore find as a fact that she did not suffer from the perils insured against, the more so when it is borne in mind that she was for some hours aground in the Moulmein

river. On the contrary I find that she encountered some unusually bad weather, and that she sustained much damage from it. The grounding does not appear to have done her any material injury, but it certainly can have done her no good.

Although the fact of the ship having been unseaworthy when the policy attached, does not under the circumstances release the insurers from all liability, it is nevertheless of much importance with reference to the question of the ship's value at the time of insurance. In the policy she is valued at Rs. 35,000, but I have no doubt that is greatly in excess of her real value. In considering the question of value, the point to be ascertained is, not so much the sum of which the plaintiff was out of pocket by reason of his connection with the *Fuzzel Curreem* from first to last, as what her actual market value was when the policy attached. The sums spent by the plaintiff, in purchasing and repairing her, are no doubt some test of her value, but they are not necessarily a correct test. It is quite possible that a vessel may be worth a great deal more than she has cost her owner: and it is equally possible that a vessel may not in reality be worth one half the money which her owner has spent upon her. The money which the plaintiff had lent to the Captain of the *Fuzzel Curreem* in no way affects the question of her value, and cannot be taken into account; for there is no evidence that, by reason of the advances made, the ship when sold brought a lower price than she would otherwise have done. At the sale by auction by Messrs. Mackenzie, Lyall and Co., the ship was sold for only Rs. 7,000. But as she was sold with a cloud on her title (there being some doubts as to the Captain's power to sell), for the removal of which the plaintiff afterwards had to pay Rs. 2,750, it is fair to give the plaintiff credit for both these sums, and say that in all he paid Rs. 10,250 for her. Then what did he expend upon her? This was not very accurately proved; but it certainly fell considerably short of Rs. 15,000. To the Caledonian Dock were paid for the principal repairs Rs. 11,544, and also Rs. 500 or 600 for a new mast. Then there were about Rs. 1,400 for copper, and Rs. 926 for copper bolts, ropes, and other stores. In putting the value of the copper

at about Rs. 1,400, I have deducted the amount received by the plaintiff for the old copper taken off. The plaintiff objects to this deduction being made. But it is clearly correct, because, inasmuch as the old copper was part of what the plaintiff bought with the ship at auction for Rs. 7,500, I shall be allowing the value of the copper on the ship twice, if I do not deduct the price of the old copper. The sums added together give something more than Rs. 14,000. But from this a further deduction has to be made in respect of a sum of Rs. 1,184 for commission allowed by the Dock proprietor to the plaintiff. The plaintiff states that some part of this commission was allowed him on another account: but there is no doubt that the larger part was paid as commission on the repairs of the *Fuzzel Curreem.* Some further sums were expended when the vessel returned from her first voyage to Madras: but those sums I set off against the general wear and tear of the ship between the time when she was repaired in the year 1861, and the date on which the present insurance commenced. On the whole I believe I do the plaintiff no injustice when I estimate the value of the ship (as judged of merely by what she has cost him) at less than Rs. 25,000. Captain Handley, believing her to be properly repaired and sound, considered her worth £7 or £8 per ton: that is to say (as she is a ship of 461 tons) worth Rs. 32,270 or Rs. 36,880. Very possibly she might have been worth that sum if her repairs had been thorough. But the repairs were insufficient, and she was not in fact sound; she must therefore have been worth much less. Taking her as worth from £ 4 to £ 5 per ton, I shall assess her value at Rs. 20,000.

There remains only the question as to whether the plaintiff had a right to abandon the ship at Moulmein as he did. I think he had. There is no doubt that the *Fuzzel Curreem* then required very extensive repairs, and that, when repaired, she would not have been worth the sum spent on her repairs. It is very questionable whether even by waiting till the North East monsoon set in, it would have been possible to bring her up to Calcutta for repairs. The plaintiff was certainly not bound to incur the risk

involved in making the attempt: and if the attempt had succeeded, it is not by any means established that even then the cost of repairs would not have exceeded her value when repaired. In abandoning her when he did, the plaintiff acted as a prudent uninsured owner would have done.

I ought to have stated earlier that I do not think the plaintiff can be considered to have had any personal knowledge that the ship was not seaworthy when he insured her. He is not himself a seafaring man, and he relied on Captain Handley. Although the repairs of the ship may have been conducted too economically, there is no reason to suppose that the plaintiff did not believe that they were being substantially conducted as recommended: and unless there were some proof of his knowledge to the contrary, he might very reasonably rest satisfied with the certificate of sea-worthiness given him by a surveyor of Captain Handley's character and experience.

In conclusion I may add that there is no evidence whatever of any such fraudulent intention on the part of the plaintiff, as the defendant in his written statement sets up.

Judgment for the plaintiff on value taken at Rs. 20,000 with costs No. 2.

EMRITLALL SALIGRAM *vs.* S. A. KIDD.

Service upon an attorneys clerk of an order directed to be served upon an attorney is not good service.

The Plaintiff in person.

Eglinton for the Defendant.

In this case an order had been made for the defendant to deliver a list of documents within eight days from the service of the order upon his attorney. 21st July 1864.

The order had been served at the defendants attorneys office on his clerk and the attorney did not deny having received it.

The defendant having failed to deliver the list, Plaintiff applied that he should be peremptorily ordered to do so within twenty four hours and in default be attached.

Macpherson J.—Service upon an Attorney's Clerk of an order directed to be served upon the Attorney is not good service. The order not having been properly served, this application must be dismissed with costs.

EMRITLOLL AND ANOTHER *vs.* L. A. KIDD.

A party having a permanent residence at Dinapore comes to Calcutta and resides there temporarily for the purpose of carrying on a suit—Held that he cannot therefore be said to dwell in Calcutta within the meaning of Sec. XII. of the Charter.

Graham for Plaintiff.

Eglinton for Defendant.

This suit was brought to recover the sum of Rs. 1065 the balance of account in respect of certain Hoondies. Aug. 23rd. 1864.

The defendant formerly carried on business in Calcutta but ceased to do so in February last. The plaint which was filed in June described him as "residing" and not as "dwelling" in Calcutta. It appeared in evidence that the Defendant had come to Calcutta for the purpose of defending another action, and that his residence there was temporary only.

Levinge J.—I think it is clear from the evidence that the defendant did not dwell in Calcutta at the time this action was brought; that is to say "dwell" in the sense in which that word is used in the 12th Section of the Charter. I consider that word has a more extended signification than the word reside, and

means a permanent, as opposed to a mere temporary residence. A traveller putting up at an hotel may be said in one sense to reside there; but a man can only be said to dwell, in the sense in which that term is used as giving jurisdiction, in the place where he ordinarily and permanently resides. When that word is used to give jurisdiction, I think it must be taken to be used in its strictest sense. It is proved that the plaintiff was in Calcutta when this action was commenced; but it appears that he came here for the temporary purpose of attending a trial of a suit, in which he was the defendant, and for no other purpose; and it cannot be said that a person arriving in Calcutta for a trial and leaving again as soon as it is over, dwells in Calcutta, within the meaning of the charter. He is described in the plaint, as residing not dwelling, at the Medical College. The word "reside" seems to have been properly chosen by the plaintiff, and expresses no more than a mere temporary residence. The statement that he was residing at the College is incorrect, as it is shown that he was at the time residing with a Mr. Esau, at Dhurrumtollah, and not at the College. The case of the *Queen vs. The Judges of the Small Cause Court* cited by Mr. Graham, and reported in 2 Taylor and Bell 4. relates to a case in which the Captain of a ship was the defendant, and in that case the Court decided that, under the Small Cause Court Act a temporary residence within the local limits of the Court is sufficient to establish jurisdiction. But it must strike one at a glance that a captain of a ship's residence or dwelling differs matenally from that of any other defendant. Of the Captain of a ship it might be said that his ship is his home, and wherever his ship was, there he would be said to dwell, although the sojourn of the ship in the port be for ever so brief a period. But a person living in this country, and who, as in the case of the defendant, has a house and a home and an establishment of servants at a distance so remote as Dinapore, and whose family have for years dwelt in the place where the defendant was born and where his father lives, stands on a different footing. It would be straining the meaning of the word "dwell" in the Charter to apply it to the temporary residence of the defendant in Calcutta, explained as that resi-

dence has been by the evidence ; and it would be highly inconvenient and defeating the very object of the Charter, which, I think, only meant to give the jurisdiction to the High Court when it attaches on the score of the residence of the defendant, when that residence is substantially the ordinary residence or dwelling of the defendant. On the evidence proved in this case I find it impossible to hold that the defendant dwells here, so as to give the Court jurisdiction. "Each case" says Chief Justice Jervis "must depend upon its particular circumstances ; but where a party has a permanent place of dwelling we do not think that he dwells, in the sense of that word as used in the statute, at a place where he has lodged for a temporary purpose only" *Macdougal* vs. *Paterson* 11 C. B. 755.

Mr. Graham seeks to draw a distinction between the case of a plaintiff and a defendant, and he argues that the term "dwell" has a different application when applied to a plaintiff from what it has when applied to a defendant ; and he relies on the authority of the case of the *Queen* vs. *Judges of the Small Cause Court*, before mentioned, in which *Chief Justice Peel* is reported to have said, referring to the defendant—"But a man may dwell without being a housekeeper, and he may be said to dwell permanently, or temporarily, using the word "dwell" as meaning to "reside," However I cannot put that construction on the term "dwell" in the Charter. The Charter when it gives jurisdiction on account of residence, must, I think, be taken to refer to the place in which the defendant dwells as affecting the convenience of the defendant and his witnesses, and possibly for the purpose of enforcing the judgment of the Court within its own jurisdiction.

The plaintiff tried to establish a ground of jurisdiction by shewing that in June at the time the action was brought the defendant carried on business in Calcutta. It is proved, however, that he ceased to carry on any business in Calcutta from the previous month of February. And it is further shown, that he had no constructive place of business in Calcutta after that date, and that

the servant who lived in Calcutta and who looked after the defendant's hides when sent down, was sent up to Dinapore in April and never returned, and the defendant appointed no successor.

It is clear to my mind on the evidence that there is no jurisdiction in this Court. The action should never have been brought in Calcutta, as the plaintiff and all his witnesses and the defendant and his witnesses reside at Dinapore.

Suit dismissed accordingly.

Mohendronauth Mitter *vs.* Koylasnauth Bannerjee.

Time Bargain.—Failure to take delivery—Act. XXI of 1848.

This was a suit to recover the sum of Rs. 11,875, the damages alleged to have been sustained by the Plaintiff by the reason of the breach of a contract to take delivery of certain Company's Paper.

Graham with *Lowe* for Plaintiff.

Newmarch with *Hyde* for Defendant.

July 25, 1864.

Levinge, J.—I think the plaintiff is entitled to a verdict, and I must say I have little sympathy for the defendant, who having first made a contract and finding it to his disadvantage, has resorted to a technical defence in order to evade a liability, and this, not during the pendency of the contract, but long after its termination. The defence set up in the written statement is certainly not the defence made at the bar. The defendant in his written statement admits the contract, but says the plaintiff consented to deliver three-fourths of the securities to one Pearymohun Chuckerbutty, and to look to him for payment. That defence is not now urged, and if it had been, I should on the evidence have given no credit to it, as it is unlikely that the plaintiff would at once have acceded to a proposal to accept a third party as a substitute for the defendant, and at the time when his right to receive the money from the defendant had actually accrued.

It was urged on behalf of the defendant by his learned Counsel, that the contract was illegal, inasmuch as it related to what he has termed a gambling transaction; and he argues it was never intended that any Company's Papers or securities should actually pass, but simply that the difference between the contract price, and the market price on the day mentioned in the contract as the day on which delivery was to be made, should be ascertained and paid to the successful party. The contract is as follows:—

"I agree to purchase from Baboo Mohendronauth Mitter, Co.'s 5½ per cent. Government promissory notes for Rs. (100,000) one lac at Rs. (14-4) fourteen rupees and four annas premium per cent, and delivery will be taken on the 24th or 25th December 1863. Calcutta, 24th November 1863."

The contract, on the face of it, is perfectly legal, and cannot be avoided as an illegal contract *per se,* unless it is shewn by evidence that it relates to a transaction which is strictly a gambling transaction. I am not going to rule that the contract which, on the face of it, is legal, is, on the evidence given in this case, wholly illegal. If I did so, I should be going contrary to many decisions passed by Judges of this Court on evidence nearly identical with the evidence given in this case. In this case, I not only feel myself bound to follow these decisions, but I readily do so; and I must leave it to a Court of Appeal to show—that the mode of dealing with contracts upon evidence like that before this Court, is wrong. I am not prepared to say that the transaction which is the subject of this contract is, on the evidence, made out to be a mere colourable contract and a gambling transaction within the legal definition of that term, although it comes as near to it as possible. My decision in this case will afford the defendant an opportunity of raising the question on appeal under Act XXI of 1848, Section 1.

A point was made by the defendant as to the day, &c., on which the papers ought to have been delivered. The contract says "delivery will be taken on the 24th or 25th December." It was stated by the plaintiff that the 24th and 25th were holidays, and consequently that the 23rd was the day on which it was necessary to make delivery. The defendant has denied that the 24th was a holiday. I have no doubt the plaintiff is right. He is corroborated by the broker, who says that the 24th was recognized as a holiday; and he is also corroborated by two letters written by the defendant on the 23rd :—one to Pearymohun Chuckerbutty and the other to Koylas Shaha—

The letters are as follows :—

" Baboo Pearymohun Chuckerbutty.

" Dear Baboo,—The bearer, Mohendrololl Mitter, will hand over to you (75,000) seventy-five thousand rupees 5½ per cent. loan notes, or commonly called Government Securities, purchased by you from me, *to-day being the day* of your contracts falling due.

Yours faithfully,

Koylasnauth Bannerjee."

23rd December 1863.

"MY DEAR KOYLAS BABOO,—I wish to see you this evening, and will jointly come upon Baboo Pearymohun Chuckerbutty who bought from me 75,000 Rupee 5½ per cent. loan notes, *deliverable on the 25th instant,* and after this being done we will both settle about Mohendrololl's matter.

Yours faithfully,

KOYLASNAUTH BANNERJEE."

23rd December 1863.

In the letter to Koylas Baboo, the papers for 75,000 Rs., bought by Pearymohun, are stated to be deliverable on the 24th and 25th, but in the letter to Pearymohun, the 23rd is stated as the day on which the contract fell due. This is a statement or admission under the defendant's own hand-writing, that the 23rd was the day for completing the contract, and not the day mentioned in the contract.

I am convinced that the defendant was in no position to pay cash for the papers for one lac, and if he could not do so, he was bound to have offered the difference in price between the contract rate and the price of paper on that day, as the fair measure of damages. On the 23rd, when the plaintiff saw him on the subject of the contract, he tried to get Pearymohun to fulfil his contract as to the papers for 75,000 Rs.; but, if he could not, that was no reason the plaintiff was to suffer in his contract. I believe the plaintiff only expected to get the difference between 14-14 the price at which the papers were sold and the market price of the day; but I also believe that he was in a position to have produced papers for a lac of rupees; and here, I may remark, that the fact that the plaintiff had not a lac of Government paper on the day he made the contract, in no way affects its validity, provided he was in a position to have obtained the paper the day the contract fell due, and that the paper was required by the defendant. I think the plaintiff could have got one lac of Government paper that day from the Bank to have produced and tendered to the defendant if he required it. Nothing was easier. He has sworn it was within his reach, and when he was to make such profit on the contract, no one can doubt that it was perfectly easy for him to have

got the paper. But in this case I think that the defendant has clearly estopped himself from relying at the bar on such a line of defence. In his letter to Pearymohun, which I have already read, he says "the bearer Mohendrololl Mitter *will hand over to you* 75,000 *Rs.* 5½ *loan notes.*" Having written such a letter on the very day, the 23rd, I think he is now estopped from saying that the plaintiff was not in a position to have produced Company's Papers to the required amount. In this class of cases I have frequently observed that I will compel the defendant to fulfil his engagement, when I find that he runs all the chances in his favor, and does not break off until after the contract has terminated. I think these native brokers and dealers ought to be made to observe faith towards each other in their dealings. The consequence of a breach of faith by one, is, perhaps, as disastrous as the removal of the key-stone to the arch. The whole falls into confusion. If one party fails, he affects many others. At the same time, I may observe, that in a contract like this going so near to the wind, if it was not clearly proved, or if there was any controversy on the merits or doubt as to the evidence on any essential matter, such as tender of the money by the defendant or the like, I should give the benefit of the doubt to the defendant, for these contracts are not to be encouraged. But when the contract is clear, and the default equally certain, and where the defendant admits the plaintiff's capacity to fulfil his contract, and only in a court of law says he cannot, I think I am doing substantial justice in making him pay the penalty for violating a contract into which he entered with his eyes open, and with the hopes of benefiting. I mean these observations, of course, to apply, when the evidence does not show that the Court is bound to hold the contract colourable and the transaction a wager. In this case, a Court ought not to say for the defendant what he did not say for himself, *viz.*, that there was no intention to pass any Company's Paper, because he expressly declares under his own hand-writing that the plaintiff will hand over the notes to his friend Pearymohun.

Lastly as to the measure of damages. The plaintiff's case is that 5½ per cent. papers were at 3 per cent. premium on the 23rd, and in his plaint and written statement, damages have been calculated at that

rate. He is also corroborated by a broker, who says that, on the 23rd, 5½ per cent. papers were from 2-8 to 3 per cent. premium. The defendant, on the other hand, says that the rate was from 6 to 7 per cent, but he is wholly unsupported, and I must say, that if papers were at a higher rate than 3 per cent, he might have given more satisfactory evidence upon the point, especially as he was aware of the case which he had to meet, and had plenty of time to prove the plaintiff's calculation wrong if he could.

I shall take the evidence as to the ruling rate given by the plaintiff at the highest rate, *viz.*, 3 per cent. premium, giving the defendant the benefit of any doubt on the plaintiff's evidence, and shall give damages accordingly.

Decree for Rs. 11,875, with interest at 6 per cent. from this date, and No. 2 costs.

BARROW *vs.* ARCHER.

The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes.

This was a motion for an injunction to restrain the defendant from erecting a certain building which it was alleged would intercept the light and air from the upper story of the Plaintiff's House.

The Advocate-General with *Graham* in support.

Newmarch with *Woodroffe* opposed.

The following cases were referred to, *viz. Winstanley* vs. *Lee*, 2 Swans 333, *Fishmongers Co.* vs. *E India Co*, I Dick 163, *Attorney General* vs. *Nicholl* 16 Ves. 338, *Webb* vs. *Bird* 31 L. J. C. B. 335, and *Moore* vs. *Rawson* 3 B & C 332.

Peterson, J.—This is a suit at the instance of the plaintiff, lessee of premises No. 8 Old Post Office Street, where they carry and have carried on their business as attornies and solicitors for sometime, to restrain by injunction the defendant, a builder, from building a wall on the adjoining premises, on the ground of obstruction of ancient lights. Upon all the material facts there

August 4, 1864.

is little or no dispute. As the premises are adjoining the Court, at the request of the parties, I went and took a view, in order to see what the obstruction was, and whether, having regard to the situation of the premises, such an encroachment on the easement was about to be committed, as to call for the interference of the Court by injunction. The premises in the occupation of the plaintiff are situate and abut on the east side of Old Post Office Street. The southern portion of the premises is bounded by the property of Mr. Money, a godown o that gentleman being built close up to the southern wall of the plaintiff's premises, and carried up to the height of the first floor of such premises. The plaintiff claims a right by prescription to have the light and air above this godown coming into the south side of the premises in and upon his verandah, which originally ran for a depth of about 37 feet West and East from Old Post Office Street. At present the east and west ends of the verandah are closed in by the defendants, and used as bath-rooms to the extent of 10 or 11 feet on either side, leaving in the centre an open space of about 17 feet. The depth of this verandah is about nine feet, and there are opening on to the verandah three French windows; the height from floor of verandah to top of windows being about 8 feet. The defendant has removed the wall abutting on the premises of plaintiff, and now proposes to build a block of buildings at a distance of 17 feet from the south side of plaintiff's verandah to a depth east and west of 29 feet, and to a height of 20 feet above the height of the level of the floor of plaintiff's verandah. The question really is, will the building of the defendant, when ran up 20 feet above the present height of the godown, and at a distance of 17 feet laterally, be such an encroachment as to give the plaintiffs a right to an injunction. The application of the plaintiff is supported by the affidavit of Prankisto Doss, who speaks as to his knowledge of the verandah in question for 29 years; but he has not stated as to what portions of it have been used open or what portions closed. There is the affidavit of one of the plaintiffs Moraleydhur Sen, who states that the intended building will obstruct the light and materially obstruct the wind that comes from the south. Mr. Osmond, a builder, and a Mr. Allan, a builder make a similar affidavit as to their opinion of the intended construction.

The latter deponent goes further, and enters into a rambling statement as to his being called in some two or three years back by Mr. Money, the owner of the premises, on the subject of making a similar erection, and states that in consequence of some objection Mr. Money desisted. If the parties putting in such an affidavit imagine the Court is likely to adopt that statement as a tacit admission by Mr. Money that he had no right to build the wall in question, they are mistaken : the Court merely treats it as waste of time and paper. Were the Court to draw any inference on such a matter, the only inference it would draw would be that it was the effusion of a man disappointed at not getting the work. On the other hand, the defendant, who is in fact only a nominal defendant, the real defendant being Mr. Money, shows the extent of the premises intended to be erected, and states his belief that the intended erection will not, to any material extent, interfere with the light so as to destroy a full and beneficial use of the premises. The premises have been for many years occupied as attorney's offices, although some persons have generally occupied a portion as a residence. I have no doubt in my mind that if it were shown satisfactorily that the building in question when executed would materially lessen the enjoyment of light and air, to which the plaintiffs lay claim by presumptive right, I ought to grant the injunction. The plaintiff does not rest his title to the enjoyment of light and air, on the principle that if the light were sufficient, the access of air would be *presumed* to be sufficient, but seems to assume a principle that, having regard to the climate, a party gets a presumptive right to the S. wind, and that as the right to light and air are co-extensive, that right to the light must go to the extent that, independently of the light being sufficient, he is entitled to a current of air, the same as a current of water, and that to the extent of such a current he is entitled to be free from all obstruction. The claim of the plaintiff is in fact this, that he gains by prescription a right to have the current of air impinge direct upon his premises in the direction the wind blows, and that it is not sufficient that he gets air ample and sufficient for all sanitary purposes, but that he gets it in the direction from which it blows, undirected by any obstruction. Such a claim would be co-extensive with a claim to a prospect. The right to such was distinctly denied by Lord Hardwicke in the case of the *Attorney-General* vs.

Doughty, 2 Vesey sen 453. I cannot see on principle any difference between the particular ray of light forming a prospect, or the motion of a particular current of air forming a wind. The learned Counsel cited a case mentioned in Viner's Abridgment—Title *Nuisance G.* par. 19, where Justice Wynot said that when one erected a house so high that the wind was stopped from the windmills in Finsbury-fields, it was adjudged it should be broken down. The only effect of the decision upon my mind is that of its absurdity. Were such a principle to be upheld the consequences would be, that to prevent an acquisition of right, the owners of adjoining property on all sides would be compelled to build up against a party, in order to prevent his getting a right to the absence of every thing, that could obstruct the direct impinging of the wind. Were it not so, a series of buildings, even 50 to 100 yards off, would as effectually destroy the direct action of the current of air, as one ten yards off. Were such a principle once admitted it might be carried to the extent that a person should not be allowed to build on the lee side of premises, and thereby obstruct the free current of air, by throwing back the air and destroying the current as in case of a water course. It must be known to any person that to have a current of air there must be a thorough draught. Although it was ably urged by the Counsel for the plaintiff that I ought to decide this point not on the cases as decided in England, but according to the circumstances of the country and the particular winds prevailing, and that a direct breeze from the S. was almost a necessity, it is equally necessary for me to see, that in studying luxury and comfort, I do not make the subservient tenement subservient to more than the Law requires, especially as the easement gained is a curtailment of the legal rights of the owner of the subservient tenement. The point as to the right to the free use of air in a particular direction was settled in the case of *Webb* vs. *Bird*, 10 C. B. N. S. 263, and although the principal point decided was as to whether a prescriptive right to the wind was within the meaning of 2 and 3 Will. 4 Cap. 71, it is quite clear from the Judgment in that case that a party could not gain a presumptive right to the wind. I may observe that as the prevailing winds are from the South West, even more than the South, the Plaintiffs would have a similar claim as against the builders of the new Courts, should the

buildings in any way differ from what they originally were before demolition. The new Courts will far more effectually shut out the South West wind than Mr. Money's erection on the South. I cannot, therefore, on principle treat the claim to the wind as a right of easement, the right of air is co-extensive with the right to light, and I am of opinion that when there is sufficient *adit* for light, it will be presumed there will be sufficient *adit* for air. With these views it is now incumbent on me, with the material before me, to say whether there is sufficient before me to justify me on the ground of exclusion of light to pass an order restrictive on Mr. Money's right to build on his own land. Having regard to the way in which daylight is most sedulously excluded in this country, and having regard to the almost perpendicular rays of the sun for nine out of the twelve months, I cannot imagine that a wall 20 feet high at a distance of 17 feet is such an obstruction as to call for the interference of the Court, nor can I think (although it must obstruct the direct action of the wind) that here is such an obstruction of air as to destroy the beneficial enjoyment of the premises. The Plaintiffs have not, by their mode of use of the premises, given me a very high opinion of the extent of their appreciation of the benefit of light and air, as they have effectually blocked the passage of both to the extent of 21 out of 37 feet. That is only of importance as to whether I should grant the injunction or leave them to their remedy for damages. It is not every speculative exclusion of light, or even sensible diminution of light, that gives a right of action, but such a diminution of light as really makes the premises to a sensible degree less fit for occupation or business. I am of opinion that there are no sufficient grounds shown me for granting the injunction. I must, therefore, refuse it with costs, without prejudice to any action for damages.

Motion refused with costs.

JUGGOBUNDOO SHAW *vs.* GRANT, SMITH & CO.

In the absence of a specific contract a European firm in Calcutta is not bound by a contract with their Banian. English precedents are only to be applied in India, after being carefully weighed and tested with regard to the customs and habits of the people.

The *Advocate-General* with *Eglinton* and *Woodroffe* for the plaintiff.
Doyne with *Graham* and *Paul* for the defendants.

In this suit the plaintiff sought to recover Rs. 2108-12-9, that sum being the balance due by the defendants for the price of Sept. 5, 1864. jute delivered to them between the 31st day of Choit, 1269, (12th April, 1863,) and the 9th Joisto, 1270, (22nd May, 1863,) with interest from the 20th Joisto at such rate as the Court might direct.

The Plaint was originally filed Sept. 3, 1863, but the hearing was postponed from time to time in consequence of a commission being issued to examine certain parties in England.

Both parties filed written statements. Moheschunder Shaw, the plaintiff's gomastah, made and verified the written statement on behalf of the plaintiff. The case made by that document was as follows :—It was alleged that the plaintiff was a jute merchant carrying on business in Calcutta, and that prior to April, 1863, the defendants from time to time purchased large quantities of jute from him through Ramcomul Mitter, the agent of the defendants to effect such purchases, or if he was not such agent, that he was held out to the world to be such to purchase for them in the Bazaar, and was permitted by them to sign receipts in respect of such purchases as follows :—" For Grant, Smith & Co., Ramcomul Mitter." It was then alleged that the jute bought by the defendants from the plaintiff was received by them, and that they paid to the plaintiff the price through Ramcomul Mitter, the receipts for which, on the closing of the transaction, were destroyed by Ramcomul Mitter, and he is therefore unable to produce them. It then stated, that after March, 1863, the defendants purchased 1877 mds., 22 seers, and gave the dates and quantities, the last supply having been made on the 21st May, 1863, the aggregate value of the jute being Rs. 8.394-7 ; and that these purchases were made like the previous ones—*viz.*, through Ramcomul Mitter, who gave receipts for the same as agent. These receipts were filed with the plaint. The statement also averred that in effecting these sales the plaintiff intended to contract with the defendants only, and give credit to them alone ; that the defendants received the jute and paid to the plaintiffs,

through Ramcomul Mitter, from time to time, Rs. 6,285-10-3, leaving the sum sued for still due.

The defendants' written statement was verified by Mr. Steele, one of the late partners of the firm. The statement, which was exceedingly concise, averred that the only member of the firm in Calcutta, at the date of the written statement was Mr. Steele, Grant and the others being in England. Mr. Steele said he knew nothing whatever of the alleged claim, and that he did not find on looking into the books of the firm, that they were in any way indebted to the plaintiff. He said he knew nothing of the transactions with Ramcomul Mitter, save that for all jute and jute-cuttings which the defendants purchased from Ramcomul Mitter, the latter had been fully paid—a statement which was not quite accurate on the defendants case, as their books shewed on this trial the sum of Rs. 1023 as due to Ramcomul. He also stated that Wyllie, one of the partners, was, at the time of the alleged transaction, accountant and book-keeper, and head assistant to the firm, and that he knew nothing whatever of the plaintiff's claim.

Levinge, J.—The real and substantial issue I have to decide is, had Ramcomul Mitter power to bind the defendants in the contracts he made for the Jute the subject of this action, so as to render them liable to the plaintiff for the price sued for ? The determination of that issue will, I apprehend, depend upon the authority, express or implied, in Ramcomul Mitter to pledge the defendants' credit. Counsel for the defendants has stated, that if the Court was against the defendants on that issue, it would still have to decide whether the plaintiffs had not so dealt with Ramcomul Mitter as to debar him from any remedy against Grant, Smith & Co. I shall not lose sight of this position.

I apprehend that the question raised in this suit is a mixed one—of law and fact. If the only question was, "did the defendants expressly authorise Ramcomul Mitter to go to the plaintiff and purchase the jute mentioned in the plaint for the defendant ?" and if that question was found in the affirmative, then the case would have wholly turned on a simple question of fact. But the Court will in this case have to

say on the facts proved, whether the defendants so conducted themselves in their dealings with, or through Ramcomul, as to make them liable in point of law to the plaintiff for the contracts sued on. Looking at the case in this light, I shall proceed to examine the evidence first, and afterwards apply what I conceive to be the law applicable to such a state as I shall hold to be proved.

I shall first dispose of the evidence given by Moheschunder, the plaintiff's gomastah. I am satisfied that he has proved that the first time Ramcomul Mitter, accompained by the broker Hurrymohun, came to purchase jute from him, which was on the 1st Maugh, he declined to part with it until he had made enquiries into the truth of Ramcomul's representation that he was the agent of Grant, Smith & Co. I believe that Ramcomul did so represent himself, and I believe that Moheschunder did make enquiries. I think his reason for enquiry seems highly probable. This was his first transaction for his master with Ramcomul. He was newly arrived in Calcutta and, therefore, before he would give delivery to a stranger, I think it likely that he took measures to satisfy himself that Ramcomul truly represented his position. I disbelieve Moheschunder when he says he went on the 2nd Maugh to the office of Grant, Smith & Co. and there saw Mr. Grant. Moheschunder's account of the interview is as follows:—"I went to Mr. Steele; Mr. Steele said, 'I am very busy; go to Mr. Grant.' I went to Mr. Grant. I saw him the same day as the *sahib* (then follow his reasons for going and the witness continues)—I told Mr. Grant, 'Ramcomul wants to take jute by giving a receipt in your name.' Mr. Grant replied.—'Do you not know he is our Bazaar sircar? Give him the jute, taking the receipt in our name.' The *sahib* said,—'Give the goods, taking the receipt in our name. You must not be anxious; you will receive the money.' Nothing more was said. I returned and delivered the jute the following day, the 3rd Maugh."

If this evidence was true, such a state of facts would prove the case for the plaintiff; but I do not believe the witness had the alleged interview with Mr. Grant. I think he has supplemented this matter to the true state of facts he has to depose to on behalf of his master, in order to make the [illegible] perfectly secure. It is the finishing touch that, I am

sorry to say, Native witnesses seldom hesitate to give to their evidence. My reasons for doubting the truth of this evidence may be summed up as follows :—Moheschunder's written statement dose not contain any allusion to an interview with any member of the firm of Grant, Smith & Co. If this direct authority had been given by Grant to Moheschunder to deal with Ramcomul as his Bazaar sircar, it never would have been omitted. The plaintiff would not have put his case on an *implied* authority. Look at these two passages, the first relating to the early purchases including the purchase of the 2nd Maugh through Ramcomul. The words are, " The agent of the defendants to effect such purchases, or if he was not such agent, as the plaintiff believes is now erroneously insisted upon by the defendants, he was throughout the transactions herein mentioned held out to the world as their agent to purchase for them in the Bazaar." And in another paragraph is to be found nearly the same passage relating to the sale of the jute the subject of this action,—"Or if as the defendants now contend, the said Ramcomul was not agent, it is the fact that he was held out to the world by the defendants as such agent, &c." It is obvious, if the gomastah had mentioned in his written statement the interview and the authority given, Grant would have been examined as to the matter under the Commission, but this revelation is kept for the day of hearing. The object of a written statement is to get at the truth and to tie parties down to the case made, to check surprises and prevent a case being made at the hearing, when the opposite party may be taken at a disadvantage. Again although Moheschunder says he told Ramcomul on the day following his interview with Mr. Grant, Ramcomul Mitter, although he corroborates Moheschunder in the allegation that the latter refused to give delivery until he made enquiries, says, that on meeting Moheschunder on the following day, he does not remember that Moheschunder said "he had seen Grant and that he had told him to give delivery. Plaintiff said he made enquiries about me. I don't remember that he mentioned Grant's name. Perhaps he may have mentioned Grant's name. I never stated to my attorney, or when summoned to the Police Court, that Moheschunder had mentioned the fact of an interview with Grant, but Mr. Carapiet applied to me for information." I may here say as a parenthesis, that I think the result of this evidence upon the most important part of the case, warrants me in saying that Moheschunder

spoke the truth, when he said in the witness-box he had not been talking over the case which he was to prove with Ramcomul Mitter, and that they had not come into Court prepared by concert to corroborate each other. Hurrymohun, the broker, who was present at the interview between Moheschunder and Ramcomul, goes a little farther than the latter, and says that the former stated, "I have learnt, and I have come back: I have enquired from Grant, Smith *sahibs, and from dealers in the bazaars.*" It further appears that Moheschunder never mentioned the subject of the alleged interview to his attorney, Mr. Carapiet, until a few days before this action came on, and he took good care not to speak of it to any one until Messrs. Grant and Steele had left this country. And it can scarcely be credited that Mr. Carapiet did not inform Moheschunder of the contents of Mr. Abbott's letter of the 25th August, 1863, in which Mr. Abbott, speaking of his clients, Grant, Smith & Co., writes:—"They have desired me to state in reply that your letter must have been addressed to them by mistake, as they never had any dealings in jute with your abovenamed clients, or with any one on their behalf."—I do not forget, either, that although the indictment and trial of Ramcomul Mitter for fraudulently representing himself as the agent of Grant, Smith & Co. took place, Moheschunder never came forward with the evidence he gave in this cause, which would have been all-important at the Police Office and on the trial.

I shall now refer to the rest of Moheschunder's evidence that I consider important. I find from that evidence as a fact that he did make enquiries in the bazaar and satisfied his own mind that the representations made by Ramcomul and Hurrymohun were correct, and that he, acting for the plaintiff, supplied the jute, for the balance of the price of which this action is brought, to Ramcomul, believing that he was dealing with Grant, Smith & Co. through Ramcomul as their accredited agent in Calcutta for the purchase and supply of jute; and that belief was, no doubt, strengthened by acquiring a knowledge that Ramcomul had made extensive purchases of jute in the preceding years for Grant, Smith & Co. in their name and through brokers, from his predecessor, the former gomastah of the plaintiff, as well as from

numerous jute dealers throughout the market, and that his authority had been recognised by the defendants. It has also been shewn in evidence that Ramcomul had paid many lacs of rupees on these contracts; and at the date of the transaction with the plaintiff through Moheschunder no complaint had been made in the bazaar as to payment. Further, I believe that the conviction in Moheschunder's mind, that he was dealing with the accredited agent of Grant, Smith & Co. for his jute the subject of this action, was strengthened by the fact that he was paid for the jute delivered on the first contract made on the 1st Maugh, in the name of Grant, Smith & Co., and that he went on the day after the delivery and got the two receipts produced at the hearing, at the office of Grant, Smith & Co., from Ramcomul Mitter. These receipts state that he was the agent for Grant, Smith & Co.

A great deal has been said at the trial by Counsel on both sides, about these receipts, and this appears to me to be the proper place to dispose of that matter.

First, it is said that the production of these two receipts by the plaintiff, which relate to the first sale of jute by his firm through Moheschunder, is opposed to the following passage in his written statement:—"The said receipts, on the closing of the several transactions to which they refer, were destroyed by the said Ramcomul Mitter and he cannot, therefore, now produce them."--I consider this passage to be nothing more than a mistake. It does not appear to have been the habit of Ramcomul to destroy the receipts, but simply to cross over or score them out, when the jute was paid for. What object could Moheschunder have had in alleging in his statement that they were always given back to Ramcomul, who destroyed them? I see none; and if these two now produced are forgeries got up by Ramcomul and Moheschunder as an essential link in the case, why should they not have been prepared before action brought or statement filed? I see no reason to believe that these two men have combined to fabricate these two documents, to prove in writing the terms on which the plaintiff's gomastah delivered the first batch of jute, and directly opposed to on allegation in the written statement. These two receipts bear every appearance of being genuine, and are exactly the same as the

other receipts proved in this cause as given to the plaintiff, and to other Bazaar dealers. Moheschunder has certainly sworn that, save in the list annexed to his affidavit, neither he nor the plaintiff has in his possession or power, any other documents or papers, in any wise relating to the subject-matter of this cause. These two receipts do not relate to the jute the subject of this suit; but as they are part of the plaintiff's proof, they should have been listed. I believe they escaped the plaintiff's notice, and have only lately been found among the papers of past transactions. I really do not see the great importance of these receipts, or that Mohes and Ramcomul would have run the risk of fabricating them for the purpose of this suit. Abundance of other evidence has been given to warrant the Court in holding that the plaintiff believed he was supplying the jute to Grant, Smith & Co. through an agent. They are only important in corroborating the gomastah when he says he got the two receipts for the first supply of jute, at the office of Grant, Smith & Co. from Ramcomul, and in a particular form; but that fact would have stood just as well on the record without a proof given to it by the production of two pieces of paper. Both Mohes and Ramcomul have sworn they were given at the office of Grant, Smith & Co.; and as Ramcomul had a seat in that office, and is not shewn by the evidence to be swearing in concert with Moheschunder, I consider the two receipts produced are genuine and were given at the office as stated.

I now examine the evidence to see what position Ramcomul really occupied in the firm of Grant, Smith & Co, and how that firm dealt with him from the commencement of his connection with them to the termination of his services. I may premise the observations I am about to make on his evidence with the remark, that it is manifest he is deeply interested in the result of this suit, and the others that are pending on the files of this Court. I therefore weigh his testimony with much caution. Grant has sworn that his firm paid Ramcomul for all the jute he procured for them. I have already shewn that this same mistake is to be found in Mr. Steele's written statement. I shall have to say a few words bye and bye on the allegation so put forward by both partners. If Messrs. Grant and Steele's version be correct, and the assertion of Ramcomul—that the firm owe Rs. 68,143-3 for jute supplied through him, including

his *dustoorie* of 4 annas—be false, Ramcomul has embezzled the money of his employers, assuming that he was agent. If he was not agent. but was dealt with as principal by the firm, and in such a way as to give the plaintiff and the other Bazaar dealers no right to look to Grant, Smith & Co., then he (Ramcomul) will be personally liable to the plaintiff and the others who have brought actions for jute unpaid for and supplied to him; so he manifestly has a deep interest in the result of this action.

The Court does not gain a scrap of information from the written statement of Mr. Steele, or from the evidence of Mr. Grant, as to the origin of their connection with Ramcomul. Nothing can be more cautious than the evidence of Mr. Grant taken under the Commission sent to Scotland. It begins thus :—" I knew a person in Calcutta named Ramcomul Mitter, and his business consisted in dealing in jute and screwing jute. *Between the months of January and June*, **1863**, I, on behalf of the defendants, entered into several verbal contracts with the said Ramcomul Mitter for the sale by him to the defendants," &c., &c. Mr. Grant's evidence is wholly silent as to the antecedents of Ramcomul, and appears to me to be given with that caution which is usually manifested by witnesses steering clear of a delicate subject.

I drew the attention of Counsel for the defendants to the remarkable caution adopted, and Mr. Doyne replied that he could understand that the Counsel who examined Grant only asked him in reference to his dealings with Ramcomul in regard to Jute supplied in 1863, because the plaintiff's cause of action was for Jute delivered between April and May, of that year. But this explanation does not satisfy me. In reading that passage, any one would suppose the witness really began his transactions in 1863, with Ramcomul, whereas, in point of fact, they date back to March or April 1861, and continued down without interruption to the end of 1862, from which period the defendants contend that Ramcomul was clearly not their agent, and they ingeniously seek to start their connection with him from this date. This caution is the more remarkable, as the plaintiff's written statement avers that the defendants before April 1863, but not stating how long before, held out Ramcomul to the world as their agent, and that the plaintiffs had sold Jute to

the firm through Ramcomul. Now it is all important in deciding this case to see not only how they stood to each other in 1863, but from the very commencement of their connection.

Ramcomul commenced business with Grant, Smith and Co., in March or April 1861: previous to this he was a writer in an office at Rs. 40 a month salary. It appears that he had a brother in the employment of Messrs. Gladstone and Wyllie, who bought Jute for that firm. Mr. Grant had formerly been in that house. Defendant's firm was making large purchases of Jute in the bazar, and they employed Ramcomul's brother to assist them. This man fell sick, and Ramcomul, on behalf of his brother, called on Grant, Smith and Co. to close their accounts. The firm it seems declined, inasmuch as they had chartered the ship *Robert Mackenzie* for Jute. Mr. Grant told Ramcomul to take up his brother's business. He did so, and made very extensive purchases in the bazar. He bought between 25 and 30,000 bales, and he says that the firm had chartered more than a dozen ships in 1861-1862. He used to attend daily at the office of Grant, Smith and Co., tell Mr. Grant the rates in the bazar, and get orders which were considered to be in force for one or two days, but not more. He bought as much as from 20 to 25,000 maunds in one day. Ramcomul besides having a seat at Grant, Smith and Co.'s Office, hired a room in the new China Bazar close to the firm, and employed a few servants under him: these he paid out of his *dustoorie*. This brings me to consider the evidence as to how Ramcomul was remunerated for his services. The arrangement made at the outset of their connection was, that Ramcomul was to receive annas four per screwed bale as *dustoorie*. This was regularly paid from March or April 1861, down to the end of 1862, and the accounts which were continuously rendered by Ramcomul during this period, detailed all the charges for the Jute including coolie hire, the passing through the Custom House and the Shipping, and the item of annas four for *dustoorie*. These accounts were finally closed on 12th January 1863, but the reason for closing them is disputed. Mr. Grant has stated in his evidence as follows: " in all cases the Jute was put on board by Ramcomul Mitter, and at his expense." This is wholly inconsistent with the evidence and the accounts produced, and on which

the defendants from time to time made payment. If the allegation contained in Mr. Grant's evidence is meant to refer to their dealings with Ramcomul since January 1863, I can only say the evidence is uncandid, and calculated to mislead; or, if meant as a general statement, it is not true. I find also as a fact, that from March or April 1861 down to the end of 1862, all Jute bought for the firm by Ramcomul was bought in the name of the firm, and all receipts were passed and given by him as the professed agent of the firm, the form being, "For Grant, Smith and Co., Ramcomul Mitter." Further, that he bought no Jute, except that supplied to Grant, Smith & Co. All his purchases went to them: no Jute was consigned or shipped in his name during the whole of his connection with Grant, Smith and Co., save one or two consignments effected by that firm in the name of their sircar Ramcomul. He transacted no business for any other firm, but he extended his purchases for Grant, Smith and Co., occasionally by obtaining Rice. I further find, as a fact, that the bazar dealers were never paid by a member of Grant, Smith and Co.'s firm, nor do they appear to have applied to any partner or clerk for payment. They were always paid by Ramcomul. He swears he used often to name the Jute dealers to Grant,—not an improbable circumstances I think,—and he says that Grant used to write their names in a memorandum book he had by his side. No such book is produced, and it is said cannot be found if it ever existed. I do not think that this matter is very material one way or the other, except, of course, in testing Ramcomul's credit. But I find as a fact that Jute-sellers in the bazar and brokers were apprised by the firm, that prior to 12th January 1863, Ramcomul Mitter had their express authority to make contracts for Jute on their account, and that the dealers supplied Jute in the belief of that authority. I really cannot reject the evidence of Buggobanchunder and Nobinchunder Shaw, although I am aware of the interest that Buggobanchunder has in the success of this, the first of a series of actions. I think the evidence given by that witness highly probable, and quite consistent with the facts proved in this case, inasmuch as it can never be credited that the defendants dealt with Ramcomul as a principal at the very outset, he being a writer on Rs. 40 per month, and suddenly employed to procure no less than 25 to 30,000 maunds of Jute in one day; and

I think it very natural that Mr. Grant, finding business going on satisfactorily with Ramcomul, should, in answer to an inquiry :— "Saheb is this Ramcomul Mitter your broker or not ?"—use the expression put into his mouth by Bhuggobanchunder.—"He is my man, give him Jute"—although it is sworn that he knew very little Hindee. The accounts given in to the firm by Ramcomul during these two years have been proved, and I have no hesitation in saying that payments being made on foot of these rendered accounts, established in conjunction with the other evidence, the fact that Ramcomul was down to the end of 1862, the Agent of Grant, Smith & Co., for the purchase of Jute, and from the course of dealing with regard to the payments in the bazár was enabled, during that period, to pledge Grant, Smith & Co.'s credit. Ramcomul swore he rendered these accounts at a few months' interval. That fact was not admitted by the other side. I have no doubt they saw the importance of these accounts, as Ramcomul charged in detail, as any agent would have done, all the expences connected with the purchase of all Jute, and 4 annas a screwed bale for his *dustoorie,* and completely refutes the position that the firm never dealt with him except as principal. These accounts were called for, but not produced by the defendants : they were, of course, not in Ramcomul's possession, having been rendered to the firm. Secondary evidence was given by the production of a copy of one which had been filed in the Crown Office among the papers connected with the prosecution of Ramcomul,—this is dated in June 1862 ; the original, it is stated, was obtained and sent home on behalf of Grant, Smith & Co., under a commission. At the close of the defendant's case, they were again pressed for the production of these accounts sworn to have been received and acted on, and at last some were reluctantly produced, fully corroborating Ramcomul's evidence, and shewing that he did, from time to time, render such accounts, and was paid on foot of them. Besides giving receipts in the name of the firm all through his connection with Grant, Smith & Co. to the Bazar dealers he signed Custom House Dockets for the firm, for the Jute purchased by him. In other words, he took all the active part in the purchasing, the screwing, the passing through the Custom House, and the shipping of the Jute, what an agent would have taken, and very different to the

part that would have been acted by the mere vendor of the article, and he was paid for all these duties 4 annas per screwed bale, and not for the article itself. I say, therefore, it is clear that he was held out in the most public and notorious way in the market, as the avowed and accredited agent of Grant, Smith and Co., in their Jute transactions.

I now approach the period when it is said a change took place in his position with the firm, although the alteration in the mode of doing business is disputed by Ramcomul, and of course by the plaintiffs. If a change in reality took place, it may be accounted for by the return in December 1862 of Grant from England, when he took over the management of the Jute purchases and exports from his partner Brown, and it may be, that he was not satisfied with the arrangement made with Ramcomul, and that he was desirous of ending his position as a sircar effecting purchases for the firm. Ramcomul swears there was no change, and the closing of the accounts at the end of 1862 is urged by the Advocate-General as the natural result of the closing of transactions with Brown, and the commencement of dealings with Mr. Grant. However, it is clear from the evidence that Ramcomul carried on precisely the same system with regard to his purchases in 1863 in the bazar, as he did prior to that date. He gave receipts in Grant, Smith and Co.'s name. He held himself out publicly and apparently openly, as their recognised agent, and he pledged their credit. He took from the bazar dealers their Jute, and that article he supplied to Grant, Smith & Co. He had no separate dealings of his own : all was done for and in the name of the firm ; the only change apparent in his course of business with regard to the firm, consisted in his not having rendered the same or any account from 12th January 1863 to the date of his dismissal. The defendants contend that from January 1863, to his dismissal in the June following, he was not their agent but that they dealt with him as principal. *(Vide Grant's evidence before alluded to.)* Ramcomul when examined on the first day of hearing said that he rendered no accounts from 12th January 1863 to the date of his dismissal. He endeavoured to retreat from the statement on the last day the case was at hearing, and at the close of the defendants' case when he was recalled, and when pressed he stated to the Court that, as regards English

consignments, he never rendered any accounts, but was paid by the firm from time to time a lump sum in cash on account generally of jute purchased for the firm, but with regard to the shipments to Colombo, he then swore, a different practice prevailed, and that for these shipments he did render accounts in the same form as those used prior to 12th January 1863. If the same accounts were rendered, and the firm paid on them as before, these facts would be strongly corroborative of Ramcomul's evidence that there was no change in the course of business, and that he continued to be, what he was before, *viz.*, their agent for the purchase of jute. My faith in the value of Ramcomul's evidence on this matter is shaken by his inconsistent statements, and yet the effect of his qualified testimony as regards the shipments to Colombo receives some support from the course adopted by the defendants in withholding the old accounts. Mr. Grant has sworn he dealt with Ramcomul from January 1863 as a principal. In this matter there is a direct conflict of testimony. Mr. Douglas, a young member of the firm, has been examined in this trial for the defendants; he said that the accounts with Ramcomul and Kessubloll, another, and the now present jute purchaser of the firm, were kept alike. If this be so, it is clear that Ramcomul was still looked on by the firm in 1863 as their agent; for Mr. Grant, in his evidence, states that Kessubloll between January and June 1863, purchased for the firm some 4,000 bales. He is termed "an assistant, sometimes called Banian." "Grant," says Kessubloll Day, was the only person who was authorized to buy in the defendants' name, or to pledge their credit in the market; all the purchases made by Kessubloll were made in the name of the defendants. The jute was taken delivery of by sircars in the employment of the defendants, and who were all known by the bazar dealers to be in their employment. However, I do not think Mr. Douglas' evidence is entitled to much weight. I think he knew little, if anything, about Ramcomul's position, and I am not going to decide this case on his testimony. It is proved that when it was ascertained early in 1863, in January, February, or March, (the exact time is not known), Ramcomul was passing jute through the Custom House for Grant, Smith and Co., and in their name, and not through their shipping clerk's hand, he was reproved by Grant, and told to desist from that

practice. On the whole of the evidence on this question as to Ramcomul Mitter's position with Grant, Smith and Co., from January 1862 to date of dismissal, I think it highly probable that Grant intended to change Ramcomul's position, and to get him to supply jute at a fixed rate per screwed bale, and that the object of this alteration was to put a stop to his purchasing in their name in the bazar, but it is wholly unnecessary for me to decide whether such an arrangement was definitely come to, and clearly understood by those parties; or whether, in point of fact, no such arrangement was agreed upon, and Grant allowed the old system to be continued, under which Ramcomul would have had a direct authority as agent to pledge their credit in the bazar, inasmuch as I have come to the conclusion on the evidence that they had, from the commencement of his service, so dealt with him as to enable him to pledge their credit in the market, not only in 1861 and 1862, but down to the date of his dismissal from their service. Grant at the conclusion of his evidence puts in this passage "Ramcomul Mitter was *never* in the defendants' employment as their servant, or in their pay." Without special pleading on the term "servant," or "in their pay," I hold he was nothing more or less then a paid agent, or bazar sircar, down to December 1862. I have but little to do with the state of the accounts between Ramcomul and Grant, Smith and Co. According to the evidence to be found in their own books, 1,028 Rs. is due to him for jute actually delivered. They made no payment after 30th May, but he swears he supplied jute to the value of Rs. 4,598-2-9 on the 4th and 5th June 1863.

I consider I have no right in this suit to give any opinion as to whether Ramcomul has honestly paid all sums received by him for jute to the bazar dealers or not. That matter must remain to be cleared up between the defendants and Ramcomul. The simple production of the books of the firm, showing a sum paid to him equal to the value of what they say he represented was the Jute supplied, would be no proof by itself ;—the accounts would have to be gone into fully on both sides. Ramcomul alleges that he supplied Jute both before and after the 30th May, the last day on which he received any payment, and that the value and his *dustoorie* amounts to Rs. 68,143-3,

which should have been paid to him, and out of which he would have satisfied the bazar dealers. I may also say that I have nothing to do with the allegations put forward on each side as to the cause of Ramcomul's dismissal in June 1863. Ramcomul states in effect that it was owing to the bazar dealers becoming clamorous for payment, and the firm not being in a position to immediately satisfy their demands, and as he failed to keep them from pressing for payment, he was dismissed. On the other hand, Mr. Grant assigns no reason in his evidence for Ramcomul's dismissal, nor does Mr. Steele in his written statement; but in the cross-examination of Ramcomul and through their Counsel, the firm alleges that it was owing to the discovery that he was using their name, and pledging their credit in the bazar. I really do not know how this may be, nor do I offer any opinion on the matter. If Ramcomul shall sue the firm, or the firm, Ramcomul, all these matters may be thoroughly investigated and decided. If his evidence on this subject be false; of course it effects his general credit as a witness, but it will be seen that I do not attach great weight to his testimony; I receive it with much caution, and I shall decide this case on the proof that exists on the record from other evidence in addition to his, and on the whole course of dealing by the firm with Ramcomul, as proved by documentary evidence, the testimony of other witnesses, and the undisputed facts of the case.

Assuming that Ramcomul's position with regard to Grant, Smith and Co. was changed in Jaunary 1863, and I give no opinion on that disputed point, and that they dealt and meant to deal with Ramcomul as a principal, and not as an agent from January 1863, will that circumstance protect them in this action on the facts proved? I hold it will not. It is a question, taking it on the defendants' own showing, which of two innocent parties is to suffer, the bazar dealer or the firm. The dealer may lose his remedy if he cannot look to the firm: the firm may possibly have to pay twice over if they have already paid Ramcomul; but if they have put it in the power of Ramcomul to pledge their credit, of the two sufferers, I consider the firm must bear the consequences, as they had it in their power to have averted the whole mischief, assuming, it in fact to exist, by dismissing Ramcomul in December 1862. Merely

changing Ramcomul's position in their own office will not, in itself, alter his position or character in the market. The firm had warning enough. They knew of his dealings before December 1862; indeed, I hold those dealings to have had their sanction. But they knew, as proved by Mr. Baddily, of his signing for the firm in passing the jute as formerly through the Custom House, after Dec. 1862, and before the contracts were made the subject of this action; and yet, although they say they reproved him for this act, they did not dismiss him or notify publicly to the dealers in the bazar that he was not their agent, and had no power to buy jute in the name of the firm. Surely they might have found a respectable substitute, or trusted all their purchases to Kessubloll. If Ramcomul had dealt in Jute on his own account, then I should have held that the plaintiffs were bound to have made the strictest enquiries in which character he made the contracts, for he would have been known in the bazar in two different positions. But he had only been known as the accredited agent of the firm, and the world knew of no change, for he continued to make his contracts in precisely the same form, signing for "Grant, Smith and Co., Ramcomul Mitter," and paying in the same way as when he was undoubtedly their agent. It was argued for the defendants that they could not be bound by the contracts of Ramcomul, as it was never their intention that he should contract for them;—but, I think, that if a firm puts a person in the position to make contracts for them, and both principal and agent conduct themselves in a long and notorious course of dealings in the open market, so as to leave but one solid and rational impression on the mind of the public, *viz.*, the relationship of principal and agent, then, I think, that position cannot be privately altered as regards the world. Nor can any private arrangement or intention of the principal operate in any way to defeat the rights of a vendor, innocent of that arrangement or intention, or preclude him from looking to the supposed principal.

I think the design of the agent to commit a fraud, and deliver the goods destined for the firm, ought not to defeat the rights of the seller if such design was completed.

I have frequently said that the doctrine of the common law of England, in questions of this kind, as well as many others, cannot be admi-

nistered with too much caution, and that cases so often quoted from English law books must be carefully weighed and tested with regard to the custom of this market, and the habits of the people. Mr. Doyne has pushed his argument to almost the length of saying, that there can be no agency in the dealings of a European firm, and a Native supplier in the bazar; that owing to the peculiar position of Europeans with Natives, a go-between is necessary to aid in obtaining those supplies from the market which the firm may require, and that the bazar dealers knowing this, never look to the firm, but in reality contract with the man who is employed to effect the purchase; and the position of Europeans perhaps unacquainted with the language, and having to trade with a race whose habits, customs, and ideas, are so opposite to our own, renders it necessary for them to employ an intermediary who is not an agent, or they would be defrauded in their bargains and contracts. I admit that there is much force in this argument, for there is no doubt that the habits and practices pursued in trade in this market, differ widely from that followed at home. But every case of the character of the one under consideration, must depend, having due regard to the custom pursued in trade in Calcutta, on its own state of facts. Mr. Doyne argued that there was no distinction between the position of Ramcomul to the firm, and the position of a *kansamah* to a private gentleman; that a *kansamah* was no agent, and had no power to bind his master in the bazar for bazar supplies, and that the course of dealing between the three parties, master, kansamah, and supplier, precluded any such relationship. As a rule, I coincide in this view, and I should not hold that a *kansamah* held the same position in a European family here, with regard to orders given by him in the market for his employer's house, as an English Gentleman's Steward or Butler at home, but I should have no hesitation in saying that a *kansamah* may so deal in the bazar, and that a master may, by a continuous course of conduct, so act with regard to those dealings as in law to vest an implied authority in that man to pledge his master's credit and make the master liable, and that no inflexible rule can be laid down on this subject. A very strong case has been cited, that of *Pathyram and Boidjonauth* vs. *Paterson and another*, 2 Boulnois 203, decided in the

late Supreme Court, where Sir B. Peacock gave judgment for the full Bench ruling, that when produce is purchased by a Banian on the general account of a European firm, credit is understood to be given to him, unless there is an express contract by or on behalf of the European firm to be responsible for the price. It would be difficult to furnish a case more clearly defining the true relationship between a Banian and a European firm than the case cited. The facts proved in that case were as follows. The plaintiff having saltpetre to sell gave authority to his broker to dispose of it; the broker took a sample to the defendants' Banian, Juggessur Sen, at their place of business; Juggessur took with him the sample into the presence of Mr. Paterson, the defendants' Manager; Juggessur, however, conducted the transaction with the Broker, and contracted for the saltpetre, and delivery was given by the plaintiffs' gomastah to Juggessur, who gave a receipt for it on account of the firm. The saltpetre when about to be shipped by order of Juggessur (who absconded a few days after the sale) was taken by Paterson & Co. The accounts between the firm and their Banian being largely to their credit, they refused to pay again for the saltpetre, having already credited Juggessur for it, and hence the action. The Court held on the general custom that credit was in point of fact only given to the Banian, and that the showing of the sample at the office of Paterson and Co. was quite consistent with the case that the contract was made with reference to the custom. That the principal was not responsible in the absence of a specific contract, and that the receipt did not alter the case. That decision is no doubt sound law having regard to the position a Banian occupies :—The custom of trade has established his relationship; and undoubtedly, in the absence of a specific contract, a European firm in Calcutta would not be bound by the contract of their Banian. But in the case now before the Court, there is no regular Banian: neither Ramcomul nor Kessubloll occupied that position. Mr. Grant's evidence shows that the dealings of his firm in the bazar as to Jute purchases were not conducted on the principle of the ordinary dealing of a European firm making purchases through their recognized Banian. We have only to look to Mr. Grant's evidence to see the position the firm stood in with

regard to the purchase of Jute. He says "It is a common thing for mercantile houses in Calcutta to have an assistant in the purchase of such goods as they require, and to whom a salary is given in addition to the *dustoorie*, or rather a share thereof is paid for his services. The defendants had between January and June 1863 such an assistant sometimes named a Banian who is named Kessubloll Day. The latter person was during the months aforesaid employed by me to purchase jute for the defendants, and he did purchase for the defendants different quantities from time to time amounting in all to I think about 4,000 bales. Kessubloll Day was the only person who was authorized to buy in the defendants' name, or to pledge their credit in the market. All the purchases made by Kessubloll Day were made in the name of the defendants. No doubt Mr. Grant draws a distinction between the position of Ramcomul and Kessubloll, and points to a different mode of transacting business with the former; but I cannot hold that either on the facts proved in this case, or on the custom prevailing in Calcutta, the defendants can escape liability on the mere statement of Mr. Grant, that these two individuals occupied towards him a different position. The public are to be looked to as well, and their position is not to be lost sight of. Mr. Doyne has also argued that supposing the plaintiffs made the enquiries, they did it only to satisfy themselves that Ramcomul was buying for a substantial European firm, and he again relied on the authority of the case from 2, Boulnois, already referred to; but I cannot find in the evidence that such was the sole object of the plaintiffs inquiry: it was to satisfy themselves that they would be justified in selling to Grant, Smith and Co., through Ramcomul Mitter, and on the credit of the firm. This Court is continually upholding and giving effect to contracts made in the bazar between principals through the medium of agents, and I think that the facts proved in this case justified the plaintiffs in concluding that Ramcomul had a general authority to buy jute on the defendants' credit. The general law on this subject may be put thus:—the extent of the agent's authority is, as between his principal and third parties, to be measured by the extent of his usual employment; for he who accredits another by employing him, must abide by the effect of that credit, and will be bound by contracts made with innocent third persons in the seeming course of the employment, and on

the faith of that credit, whether the employer intended to authorize them or not, since when one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer. This principle is applied to sales (see *Trueman* vs. *Loder* 11 A and E 591) and to every species of mercantile transaction all the world over, and whether the agent have or have not been dismissed from the employer's service, provided that the third party had no reason to be aware of the determination of his employment. See for an authority supporting this position. *Summers* vs. *Saloman* 26 L. J. Q. B. 301 and the cases on this subject discussed in Smith's Mercantile Law (6 Ed. pp. 131 to 135). I think this doctrine is applicable to this case, although the principals are a European firm carrying on trade in Calcutta, and a Native bazar dealer, and the intermediary is a sircar or man employed to do commissions, a position undoubtedly long held by Ramcomul. I think Grant, Smith and Co., could have clearly held all bazar dealers to their contracts, made through Ramcomul down to the end of 1862, and that the firm were equally bound by them; and this clearly establishes and sets on foot the relationship of principal and agent in the bazar. Lastly with regard to the point made for the defendants that the plaintiffs so dealt with Ramcomul, by receiving payment from him, and so forth, as to disentitle them now to look to the defendants for payment, I can only say, I see nothing in their conduct to prevent their suing the defendants. I believe they acted all through *optimâ fide*, and only trusted Ramcomul as the agent of the defendants.

There must, therefore, be a decree for the plaintiff for the sum of Rs. 2,108-12-9, the balance due on the contract value of the jute supplied. There is a claim for interest in the plaint; but the Court has not been asked at the bar to award any, and under the circumstances of this case, I think, substantial justice will be done in only decreeing interest at the Court rate, viz., 6 per cent. on the amount adjudged from date of decree, and costs to be taxed and recovered by the plaintiff on scale No. 2.

Decree accordingly.

JOHN COCHRANE, *Official Assignee and the Assignee of the estate and effects of* **E. D. LATAPIE,** *an Insolvent* **vs. M. S. OWEN.**

To an action brought, prosecuted, or defended by the Official Assignee, it cannot be objected that such action was brought, prosecuted, or defended without leave first obtained from the Court. Should, however, the Official Assignee bring, prosecute, or defend any such action without leave first obtained from the Court, he will do so at his own risk in regard to the matter of costs.

This was an application made by the Official Assignee for leave to prosecute the above suit already commenced in the Court of Small Causes.

Levinge, J.—This is an application for leave to prosecute a suit already commenced. I am not aware that I have any authority to give the permission asked, or to make an order *nunc pro tunc.* This is an application made after a step has been taken; and by granting this motion I should be altering the position of the parties. If there is anything in the objection, that the suit ought not to have been brought without leave, it is now too late to ask for leave, and if the action was defective on that account, the Court should have dismissed the suit. I am, however, clearly of opinion, that, as between the assignee and the defendant, it was not requisite to have obtained an order of the Insolvent Court before the suit was instituted in the Small Cause Court. July 30, 1864.

The Indian Act (11 Vic. c. xxi., s. 29) enacts, "that *it shall be lawful* for the Assignee or Assignees, with leave of the Court first obtained, to commence, prosecute, or defend any suits or actions at law or in equity, which the insolvent might have commenced, and prosecuted, or defended, and to defray the costs to which he may be put in respect of such suits or actions out of the proceeds of the estate and effects of the insolvent."

The English Act (12 and 13 Vic. c. cvi. s. 153), which is far stronger in its language than the Indian Act, enacts "that the Assignees, with the leave of the Court first obtained, upon application to such Court, but not otherwise, may commence, prosecute, or defend any action at

law, or suit in equity which the bankrupt might have commenced, prosecuted, or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt."

The words in the English Act, " that the Assignees, with the leave of the Court first obtained, but not otherwise," would, at first sight seem to support the view that the Assignees of a bankrupt, under the English Act, have no right to sue, unless they shall have obtained the leave of the Court of Bankruptcy. It was, however, held in the case of *Lee and others, Assignees of Hawke* vs. *Langster and another*, 3 Jur. N. S. C. P. 444, that the statute intended to make the requisite leave a matter only between the Assignees, the creditors, and the Court of Bankruptcy, and not one between the Assignee and the defendant. In that case Mr. Justice Williams delivered judgment for the full Court, stating " that they were satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the Assignees and the Court of Bankruptcy, and not at all between the Assignees and the other party to the suit."

The construction put upon the English Act must apply with even greater force to the Indian Act, for the language of the latter Act is not as restrictive as that used in the former. It appears to me that the object of the Act was not to put a debtor, when sued by the Assignee of an insolvent creditor in a better position than he would have been, had not the creditor become insolvent, but to protect the Assignee, as between himself and the creditors of the insolvent. If the Assignee obtained the sanction of the Court, then undoubtedly the Court would authorise the payments of costs to be made out of the funds of the insolvent. But if without that sanction he instituted an unfounded action, or ran the risk of success and failed, the Court would require a strong case to be made out, before it would indemnify the Assignee, and order a distribution of the property of the creditors to pay the Assignee's costs. The defendant can look to the Assignee for his costs, and if he be successful, he may have his remedy against the Assignee. It appears to me clear that the only persons who can take advantage of the Assignee's neglect to ob-

tain the order of the Court are the creditors, should occasion ever require their so doing. I, therefore, refuse this application.

Application refused.

In the Matter of Sreemutty Beenodeeny Dossee, an Infant.

The Court will not issue a Commission for the examination of an Infant of tender years.

In this case a Writ of *Habeas Corpus* had been served upon one Tareeneechurn Bose, calling upon him to produce the body of S. M. Beenodeeny Dossee, an Infant aged 11 years, the widow of his deceased brother. The Infant did not appear. September 26, 1864.

Eglinton, on behalf of the father, at whose instance the Writ had been issued contended, that the presence of the Infant was absolutely necessary. She would, of course, be allowed to remain in her Palki, but it was essential that she should be examined, and that her examination should take place in Court.

Evans, contra, maintained that there was no necessity to have the Infant examined in Court. In the case of *Thakoormony Dossee,* Hyde's Reports for 1863, the examination had been conducted by Commission, and there was no reason why the Court should deviate from the precedent established in that case.

Macpherson, J. said, that in this case the Infant was a child of 11 years of age, and it would be a mere farce to examine a person of that age under a commission. The circumstance of infancy distinguished the present case from others in which Commissions had issued. Questions might, no doubt, arise as to the legal guardianship of the Infant, but the Writ had been granted, and the case could not be properly disposed of without the presence of the Infant. The child must be produced.

Ordered accordingly.

Ross Johnson *vs.* Secretary of State.

Principal and Agent—Extent of authority.

Newmarch, with *Woodroffe* and *Evans* for Plaintiff.

The *Advocate-General* with *Graham* for Defendant.

Sept. 21, 1864.

The plaintiff's case as set forth in his bill of complaint may be shortly stated as follows:—In may 1856, the plainttff, in consequenue of an advertisement inserted in the newspapers by the Government Superintendent of the Dhoom Forests, attended an auction sale of the right of cutting certain trees in the Kotrie Dhoom Forest, and purchased at the price of Rs. 3 each, 7,320 trees then offered for sale. Subsequently the Superintendent, Capain Reid, gave him (in accordance with a previous arrangement) a letter to the effect that the Government would afford the plaintiff and his timber complete protection, and would make proper forest roads. In November 1856, the trees were made over to plaintiff, who began cutting them and converting them into railway sleepers. When he had made about 70,000 sleepers, the Superintendent of Forests proposed to plaintiff that he should supply Government with 50,000 sleepers at Rs. 3 each, deliverable at a place called Myapore, and that in consideration of this price being below the market rates, the Government should allow plaintiff to cut, free of charge, such a number of *crooked* trees as should produce other 50,000 sleepers in lieu of those to be supplied to Government.

The plaintiff consented to terms proposed, and signed an agreement, undertaking to deliver the 50,000 sleepers, at Rs. 3 per sleeper; Rs. 2-8 to be paid in advance, and the remaining eight annas to be paid on delivery of the full number of sleepers. The plaintiff stated in his bill that although the agreement was silent as to the crooked trees, it was entered into in consequence of the previous permission which he had received to cut the crooked trees. The Superintendent of Forests pointed out the crooked trees to be cut, and the plaintiff proceeded to cut them up into sleepers, and was employed in so doing and in delivering the 50,000 sleepers to Government when the Mutinies broke out, and the plaintiff's camp was attacked and burnt, and all forest operations put an end to. At that time the plaintiff had actually delivered a good many

sleepers; others were on their way to Myapore, the place of delivery; and more were lying on the forest roads, ready to be carried away.

In June 1858, the plaintiff was recommended by his medical advisers to proceed to Europe; and thereupon the plaintiff appointed the defendant Scott to act for him, and to complete his contract to deliver the 50,000 sleepers as soon as the forests should be cleared of rebels. Scott was approved of by the Superintendent of Forests, and agreements in writing were interchanged; Scott undertaking, on plaintiff's behalf, to complete the contract for the 50,000 sleepers, and pledging all Johnson's timber in the forests as security; and the Superintendent agreeing to allow Scott to carry out the contract. The plaintiff then went to Europe. In October 1858, Scott was setting out for the forest, when he received a letter from Mr. Finn, then recently appointed Superintendent in the room of Captain Reid. A correspondence ensued, in which Scott's authority to act for Johnson was questioned, and some new conditions were sought to be imposed upon him, which he refused to accept. The result was that Scott was prevented from entering the forest or doing anything towards the completion of the contract. The prayer of the bill was for a declaration of the rights of the plaintiff, and for an account of the 7,320 trees purchased at the auction sale, and also of the crooked trees which Captain Reid gave the plaintiff permission to cut; the account being taken on the footing that the defendant was bound to afford complete protection to the plaintiff's timber, and to make roads, and that the plaintiff was not bound by any Forest Rules. The bill also prayed for a decree that the defendant should pay the plaintiff what should be found due on taking such account, and also all damages sustained by the plaintiff by reason of the exclusion of Scott from the forests.

The answer of the Secretary of State admitted the plaintiff's case in the main, save that the defendant wholly repudiated to be bound by Captain Reid's acts, in respect of the alleged contract as to crooked trees, and in respect of the alleged guarantee to protect the plaintiff's timber, and make roads. The answer stated that the plaintiff was entitled only to the 7,320 trees purchased by him, and that they were purchased by him subject to certain Forest Rules.

Macpherson, J.—The bill in this suit is long and rambling, and

contains much wholly irrelevant matter, introduced merely to give the transactions between the parties an appearance of complication, so as to justify recourse being had to a suit in Equity, instead of to an action at Common Law. The bill, when stripped of its superfluities, really shows no cause of action whatever against the Government, except such as arises from the exclusion of Scott from the forest; and the suit is, on the face of it, only a suit to recover damages from the defendant for his breach of contract in preventing the plaintiff from re-entering the forest by his agent Scott. It is a simple question of damages:—Is the plaintiff entitled to recover any, and, if any, what damages from the defendant by reason of the alleged breach of contract? I am wholly at a loss to see why that question could not have been dealt with in the ordinary way, by an action at Law, just as well as by a suit in Equity. Every claim which the plaintiff had against the defendant could have been easily included and disposed of in one action. There may be, and probably is, some difficulty at this time in getting evidence now as to what passed some years ago, with reference to this timber. But there are no long or complicated accounts between the parties. A plaintiff cannot entitle himself to sue in Equity instead of at Law by merely alleging that there are intricate accounts, when there are none: nor does he strengthen his case by swelling his own side of the account with the charges which patently have not a shadow of legal foundation, but are purely fanciful and absurd, such as the item set forth in para. 40 of the bill:— "To loss of profits to Mr. Johnson by the acts of Government in stopping his works for three years, as Rs. 50,000 per annum=Rs. 7,50,000." *Mackintosh* vs. *The Great Western Railway Company*, 3 Smale and Giffard 146, and other well known cases have been quoted by the Counsel for the plaintiff. But they really are wholly inapplicable to the present question. In those cases there were admittedly accounts between the parties of the most complicated description, and such as could not possibly have been satisfactorily settled in an action at Common Law. But in this case there were not any long or complicated accounts, and the question to be tried is a simple one of damages. In my opinion, the plaintiff's remedy was at Common Law, and not in Equity, and this suit therefore, ought to be dismissed.

As however, under the procedure of the Court, introduced since this suit was instituted, the distinction between Law and Equity may be said to have disappeared, except as regards suits under the old procedure, the dismissal of the bill, simply because the plaintiff has sought relief in Equity instead of at Common Law, may perhaps, now appear to be rather a harsh and technical measure. I shall, therefore, not stop here, but shall proceed to consider how the case stands on the merits.

There is no dispute between the parties as to the fact of the plaintiff having, at a sale by public auction, become the purchaser of 7,320 trees, and of having subsequently contracted to supply the Government with 50,000 sleepers at Rs. 3 each, deliverable at Myapore. But the parties are at issue as to whether any undertaking to protect the plaintiff's timber, or to make roads, ever was given by Captain Reid; or, if given, is binding on the defendant: and they are also at issue as to whether the plaintiff purchased the 7,320 trees, subject to certain "Forest Rules" then in force. Finally, the parties are at issue as to the alleged permission to cut croocked trees: the defendant contending that if any such permission was given by Captain Reid, it was wholly unauthorised and unwarrantable, and that as Captain Reid's acts in this respect were repudiated by Government as soon as they became known, they are in no way binding on the defendant.

On the issue as to whether the original purchase of the 7,320 trees was made subject to the Forest Rules, I find in favour of the plaintiff. It is proved that, at the time of the sale, certain Forest Rules were in force. It is also proved that Captain Reid who sold the trees, was the Superintendent of Forests, but that he held his office in immediate subordination to Colonel Baird Smith, the Superintendent of Canals, and that he sold under a special notification of Goxernment of January 31st, 1855. The plaintiff, however, deposes that at the time he purchased the trees he was told nothing and knew nothing of any Forest Rules, or of the nature or extent of Captain Reid's powers, but that at the sale he signed a paper agreeing unconditionally to abide by the orders of the Superintendent of Forests. What the plaintiff says as to the document he signed, is supported by Captain Reid; and there is no ev-

dence to show that Mr. Johnson knew of any Forest Rules, or contracted with reference to them. On the issue as to the guarantee to protect the plaintiff and his timber, and to make roads, my finding is in favour of the defendant. Mr. Johnson's story is that a few days subsequent to the purchase, Captain Reid, as Superintendent of Forests, at his request gave him in writing an unconditional guarantee to make and keep up roads, "and efficiently to protect your timber lying in the said forests from all destruction or robbery." Captain Reid does not recollect having ever written any such letter; but he admits having had a conversation on the subject of roads, and having told the plaintiff he would be assisted in the matter of the making and keeping up of the main roads through the forest: and he says that as a matter of fact it had been announced by Government that such assistance would be afforded. As regards the protection of the timber, Captain Reid says that he had a protective establishment, or Forest Police, for the protection of the forest generally, and to prevent breaches the Forest Rules; but he denies having ever given any guarantee of protection beyond having said that the timber would be safe, if the plaintiff took due precautions to protect it from the fires which frequently occurred in the forest. He further states that if he did engage to protect the timber from all destruction and robbery, he had no authority so to do. The letter which he says Captain Reid gave to him is not produced. It is stated to have been burnt or destroyed during the Mutinies. And here I may remark that one of the peculiar features in this case is, that although much correspondence is alleged to have taken place at the time the transactions out of which this suit arises were occurring, comparatively few of the letters which passed are now forthcoming. Mr. Johnson deposes that so far as they are letters which ought now to be in his possession, they were all destroyed during the Mutinies, when his camp was plundered and burnt by the sepoys. If may be that they were so destroyed but, nevertheless, it cannot be otherwise than highly perplexing for the Court to have before it only the recollection of witnesses as to the existence or non-existence of a series of documents, and as to their contents. To return, however, to the question of the guarantee, I cannot say that as the case stands I think it is

established that any such absolute gaurantee as is set up was ever given: and I believe that nothing further passed than is spoken to by Captain Reid. It is highly improbable that the Government should, at any time, have meant to guarantee the *absolute* safety of all timber in the forest. And it is difficult to understand why Captain Reid should have given the plaintiff such a guarantee. Even if the guarantee had been given in the terms set forth by the plaintiff, it would not have covered the extraordinary and unforseen losses caused by the acts of the mutineers and rebels in 1857, and 1858. But in fact there never was any special guarantee, or anything beyond the statement that the Government would keep a Forest Police for the general protection of the forest, and of the persons employed therein.

The case, as to the undertaking to make and repair roads, is exactly in the same position. There, no doubt, was a general promise that the Government would make and keep up the main roads in the forest, but nothing more.

Supposing that Captain Reid had guaranteed the plaintiff's timber from protection "against all destruction and robbery," the guarantee is one of so very extraordinary a kind, that the defendant would not be bound by it, unless he had authorised Captain Reid to gave it. Such a guarantee is quite beyound the general authority of any agent, and Captain Reid, it is proved, had no special authority to give it.

I now come to the most important question in the whole case—that, namely, as to the permissiou given by Captain Reid to the plaintiff to cut as many crooked trees as might be necessary to enable him to make for himself 50,000 sleepers to replace those supplied to Government.

Captain Reid says the arrangement as to the crooked trees was part and parcel of the contract for the delivery of the 50,000 sleepers: and the plaintiff says that, in consideration of his supplying Government with 50,000 sleepers at Rs. 3 per sleeper, he was to be allowed to cut for himself, free of charge, 50,000 sleepers from crooked trees.

The plaintifi's evidence is, that Captain Reid wrote to him a letter in which he offered to allow the plaintifi to cut the crooked trees in

consideration of his supplying 50,000 sleepers at Rs. 3 each. This letter is not forthcoming, being one of those which it is said were destroyed during the Mutinies. Captain Reid, while fully admitting that the arrangement was made, denies that it was ever put in writing and says that it was made by him verbally before making the written contract of the 15th of January, 1857, to which I shall prsently allude more particularly. Probably Captain Reid's statement is correct; certainly, in the face of it, I decline to find, as a fact, that any such letter as is alleged ever was written by him. It appears to me that in the conduct, both of Captain Reid and of the plaintiff, there are strong indications of a desire to keep the transaction as to the crooked trees out of sight altogether, and that neither the one nor the other wished or intended to have it put formally on record. Although both the plaintiff and Captain Reid admit that the arrangement was made before the written agreement, and that the permission to cut the crooked trees was, in truth, a most important portion of the consideration for the contract, nevertheless the agreement which was drawn up by the plaintiff himself and signed by him, is wholly silent as to the crooked trees. The agreement is set out in the 12th para. of the plaintiff's bill, and is an agreement to deliver 50,000 sleepers at Maypore for Rs. 3 each ; no other consideration save the Rs. 3 being mentioned, or in any way alluded to. Further, the permission to cut the crooked trees was never reported by Captain Reid to Colonel Baird Smith, his immediate superior, to whom it was his duty to have reported it, and to whom he did, in fact, report the original sale of 7,320 trees to the plaintiff, and the agreement of January 15th, to supply 50,000 sleepers at Rs. 3 each. Still further the arrangement as to the crooked trees was never made known by Captain Reid to any other officer of Government until June, 1859, when he first mentioned it in reply to a letter requiring an explanation as to how it was possible that Mr. Johnson could, from the 7,320 trees orriginally purchased by him, have cut so many sleepers as appeared to have been cut by him in the forest. In a letter of October, 1858, to Captain Morton, who had then succeeded Colonel Baird Smith, Captain Reid still treats the contract as one for the delivery of 50,000 sleepers at Rs. 3, and as thereby giving Government a clear profit of four annas, as the Railway

paid Government Rs 3-4 for the same sleepers. What may have been Captain Reid's motive for his conduct on this occasion, it is, perhaps, scarcely necessary to inquire; but probably it was nothing more than a foolish desire to shew, at any cost, as much an appearance of profit to Government in his forest accounts as he possibly could. Colonel Baird Smith, made Captain Reid enter into the contract with the Railway, in order to test the canal, and increase the return from it by the sums to be charged for floating down the timber on it. Reid finding himself unable to carry out the contract, sublet it; but, being anxious in his turn, to make his forest accounts look well, could not bring himself to abandon the four annas profiit on each sleeper, and in order to retain it, sacrificed the crooked trees.

It is beyond all doubt that Captain Reid, in giving the plaintiff permission to cut the crooked trees, acted without authority, and grossly and manifestly in excess of the powers given to him by Government and indicated in the Notification of the 31st January, 1855, which limits the power of the Superintendant, in disposing of trees in the forest, to sale by public auction duly advertised, and which expressly prohibits all indiscriminate felling of trees in the forests. It is not proved that the plaintiff ever saw this Notification, or that he had express notice of the limited powers with which Captain Reid was, on his appoinment, invested. But that will not assist him in this case, for not only had Captain Reid, in fact, no authority to give the permission to cut the crooked trees, but, in my opinion, the plaintiff must, under the circumsances, be taken to have known all along that Captain Reid was dealing unauthorisedly and improperly in allowing him to cut those trees. On the first interview which the plaintiff had with Captain Reid, when he expressed a wish to become a purchaser of timber in the Government forests, Captain Reid told him that if he wish to purchase timber, he could see by the advertisements when and where auctions would be held, and that he would have to attend the sales if he wished to purchase. Having originally been told by Captain Reid that all sales must be by public auction, it became Mr. Johnson's duty to make some enquiry as to Captain Reid's powers when he found him subsequently offering to dispose privately of such a large quantity of

timber. Then I find that, in his written agreement to supply the 50,000 sleepers the plaintiff omits the mention of any consideration, save the Rs. 3 per sleeper—an omission which I cannot suppose to have been accidental. The way in which the plaintiff, apparently puts the transaction is, that he declined to come to any terms unless he got permission to cut the crooked tree; that the permission was granted, and that then the contract to deliver at Rs. 3 per sleeper was made. But, put the transaction as you will, it is evident that the right to cut those crooked trees was practically part of the consideration for the contract. Supposing it not to be so, it was a free and absolute gift made by Capt. Reid of what both he and the plaintiff knew to be the property of the Govt., and beyond the competency of Captain Reid to give away. Finally I think the plaintiff must be taken to have known that Captain Reid was acting unauthorisedly and improperly, because the arrangement is, on the face of it, extravagant, and such as no agent could, in the absence of express authority, be reasonably supposed by any man of ordinary business habits to be empowered by his principal to enter into. It was at best an agreement to give up to the plaintiff 1,000 trees, each capable of producing five sleepers, in order to induce the plaintiff to deliver 50,000 sleepers at the nominal price of Rs. 3. Although now at this price of Rs. 3 the plaintiff would have realised a considerable profit, some idea of the loss to Government by such a permission may be formed from the estimate given by the plaintiff of the profits which he would have made out of it. I have said that it was giving up 10,000 trees. I am aware that there is some quesion as to the average number of sleepers which these trees would have produced, and that the defendant in his answer has given rather a higher average than I do. On the evidence before me, however, I have no doubt that an average of 5 is above, rather than under, the mark, and that 10,000 crooked trees at least would have been required to produce 50,000 sleepers.

On the whole, I have no hisitation in declearing that Captain Reid had no authority whatever to allow the plaintiff to cut the crooked trees; that the plaintiff knew he had no authority; and that the Government were perfectly justified in repudiating the acts of Captain

Reid as soon as they became hnown, which was not till about the middle of 1859. The question as to how far the Secretary of State for India is bound by the acts of the servants of the Government has so recently been fully discussed and considered by this Court, in the case of *Rundle* vs. *The Secretary of State* Hyde's Rep. for 1863 p. 39, that it is unnecessary for me to do more than say that I follow the law as laid down in the case, before the Privy Council, of the *Collector of Masulipatam*, 8, Moore's Indian Appeals p. 500. And this brings me to the consideration of the circumstances under which the plaintiff and his agent were excluded from the forests; and of the issue whether the plaintiff is entitled to recover any, and if any, what damages, from the defendant on account of such exclusion.

The plaintiff had partially fulfilled his contract for the 50,000 sleepers before the Mutinies broke out, and he had prepared many sleepers both from the trees originally purchased by him, and from the crooked trees.

About the middle of 1858 the plaintiff went to England, and up to that time the rebels remained in the forest, and no work could be carried on there. Before Mr. Johnson went to England he appointed the defendant, Scott, to carry out his contract, and Captain Reid approved of his appointment; Scott giving Reid an agreement in the following terms :—" I hereby agree, on Mr. H. C. R. Johnson's behalf, to carry out and complete his contract for 50,000 sleepers. In failure thereof, and as security, I agree to the forfeiture of all Mr. Johnson's timber lying in the Kotrie Dhoom Forest, which he has transferred to me."—and Reid giving Scott a document in which he stated that he, at the request of Mr. Johnson, agreed to allow Scott to complete the contract. This document also contained the details of the timber in the forest which belonged to the plaintiff (in Captain Reid's opinion), and were to be subject to forfeiture if the contract were not carried out. Matters being thus settled, the plaintiff went to Europe; and, some time after he had gone, Scott was about to proceed to the forest, which had recently been cleared of rebels, when he received a letter from Mr. Finn, Captain Reid's successor, asking Scott to inform him whether he agreed " to take the entire of Mr. Johnson's responsibili-

ties in the matter of the abovementioned contract" upon himself, and whether he would pledge himself to complete the contract on or before the month of July, 1859. Thereupon there ensued a correspondence in which I must say that, so far as what appears on the face of the letters goes, Mr. Scott has very much the best of it. Many months afterwards the Goverment was made acquainted with the private arrangement which Captain Reid had made as to crooked trees, and it, therefore, now appears that what followed on the correspondence I have just referred to—namely, the exclution of Mr. Scoot and his men form the forest, was justifiable and proper. But on the face of the correspondence, taking it by itself, the conduct of the Government officers cannot be justified. The plaintiff made a simple contract to deliver certain sleepers, and was under no obligation, expressed or implied personally to superintend their delivery, or to remain in India till the contract was fulfilled. He was engaged in carrying it out, when theMutinies stopped his operations. More then a year afterwards he went to England. Before he went, he not only appointed Mr. Scoot as his agent to complete his contract,—which he had a perfect right to do, without reference to Captain Reid, or any body else,— but he got Reid's express approval of Scott as a fit and proper representative. Further, he pledged all his timber in the forest as a guarantee for the *bona fides* of himself and Scott, so far as the completion of the con tract was concerned. Yet, no sooner was he gone, than a number of unreasonable objections raised to Scott's carrying out the contract, and, in the end, he was prevented from even attempting to do so. It has been stated at the Bar that the real reason why Scott was excluded was, that it had about that time been discovered by Mr. Finn that many more trees had been cut by the plaintiff's workmen then the 7,320 which he had purchased. Mr. Finn is now dead, and we do not know what the result of his evidence might have been had he been alive to be examined as a witness in this cause. The correspondence shows wholly different reasons for Scott's exclusion, save one passage in a letter of Finn's dated the 22nd of October, 1858, in which he asks Scott to make himself " amenable for any Government or unsold trees wnich have been felled in the Kotrie Dhoom, either by Mr. Jhonson's own order, or by the order of any other person or persons, for the

intended benefit of Mr. Johnson." It is much to be regretted that if those facts were, at the time, known to the officers of Government, which justified the course they pursued, they did not bring them forward them As it is, they excluded Mr. Scott from the forest, and the only reasons assigned by them for so doing, except the reasons indicated in the above extract from Mr. Finn's letter, were insufficient. Nevertheless, at the time when this correspondence was going on, the Government had, in fact, very substantial though, perhaps, then only partially known, reasons for excluding the plaintiff and his agent from the forest, for he had cut down very many more trees then he had puchased, or than he had any right to cut, and he sought to re-enter the forest for the purpose of carrying off, not only the timber which was his own, but also timber which belonged to the Government. If the Government, being fully aware the true state of matter, had refused to allow Scott to enter the forest, they would have been justified in so doing, inasmuch as Scott was professedly going to the forest in order to remove timber which belonged to the defendent, as well as timber which belonged to the plaintiff. Such being his avowed object, I do not think it is open to the plaintiff to say that, in any event, he should have been allowed to return to the forest, in order to remove the timber originally purchased by him. The defendant would have a right to say " It is true there may be some timber of yours in the forest ; but the forest is mine, and as you claim, and say you mean to carry off, a quantity of my timber, in addition to your own, I refuse to allow you to enter." If the plaintiff sustained any loss by reason of his being so excluded under such circumstances, he could not have recovered it from the defendant ; the breaking of the contract on the part of the defendant being in consequnce of the wrongful claim set up by the plaintiff, and his declared intention to enforce it by doing a wrongful act. There is no doubt that the exclusion of the plaintiff from the forest is justifiable from the time when the Government officers became aware of what had happened, which was in 1859. But it may be said that the exclusion in 1858 is not justified, as wrong reasons were assigned for it at the time, and as the facts which, if known, would have justified it were not then fully known. But the giving a wrong reason for it will not prevent the defendant from justifying his act, if it can

be justified, as is said by Baron Parke in *Lucas* vs. *Nookalls.* 10 Bingham 171 : " I take it to be perfectly clear and settled law that if a man has a legal authority by writ, or otherwise, to do all that he does, it is quite immaterial whether he intends to use that authority or not, or even declare that he does not intend to use it." *Ridgway* vs. *The Hungerford Market Co.* 3 Ad. & El. 171, *Baillie* vs. *Kell,* 4 Bing. N. S. 639, and *Cussons* vs. *Skinner* 11 M. W. 161. are all cases of breach of contract, and shew that a master may justify the dismissal of a servant upon a ground other than that assigned at the time of the dismissal, proved at that time the cause existed and was known to him. And in *Ridgway* vs. *The Hungerford Market Company,* Lord Denman says that the justification would be good, even if the fact, existing at the time, was not known to the master. So, in the present case, I think that the justification is good ; for, whatever may have been the reasons assigned for excluding Scott from the forest, the Government had, in fact, then, good reasons for excluding him. It is not quite clear to what extent the facts which justify the exclusion were the same in 1858 to the defendant, but according to the ruling of Lord Denman which I have quoted, that is immaterial.

The exclusion being justifiable, the defendant, if liable at all, could, in no possible event, be liable to the plaintiff for more than the bare value of the residue of the 7,320 trees, cut and uncut, as they stood or lay in the forest ; and that value is far less than the balance due from the plaintiff, of the advances received by him. I may add that it appears to me in the evidence that, even taking the account liberally in the plaintiff's favour, and charging the defendant with any profit which would have been made by the plaintiff, the balance, when the large sum received by him by way of advance, is kept in view, is still against the plaintiff. When I say this I speak of an account of the damages sustained by the plaintiff by reason of the defendant preventing him from returning to the forest in November 1858, for the purpose of looking after, and removing, the residue then remaining there of the 7,320 trees, such account being taken on the footing of the Government not being liable for any losses caused by the Mutinies, and of the plaintiff being entitled to no timber, or any thing else in the forests, save the

7,320 trees originally purchased, and the proceeds of those trees. On the whole, and every view of the case, I think that the bill must be dismissed with costs.

Bill dismissed accordingly.

OWEN WILLIAMS *vs.* GREAT EASTERN HOTEL COMPANY " LIMITED."

Master and Servant—Special contract—Alleged wrongful dismissal.

Coryton with *Hyde* for Plaintiff.

Eglinton with *Evans* for Defendants.

Sept. 2, 1864.

This suit was brought to recover the sum of Rs 7,740 damages for the wrongful dismissal of the plaintiff from the service of the defendants. The agreement which was admitted ran as follows :—" Memorandum of agreement made and entered into this 25th day of November 1863, between David Wilson, of 79, Cannon Street, in the city of London, merchant, for and on behalf of the Great Eastern Hotel Company Limited, of Calcutta, of the one part, and Owen Williams, of 3, Alfred Terrace, Bermondsey, engineer, of the other part. The said David Wilson hereby engages the said Owen Williams to proceed to Calcutta overland, and there enter into the service of the Great Eastern Hotel Company Limited in the capacity of engineer, and to make himself generally useful in any of the works carried on in, or connected with the said Great Eastern Hotel Company Limitted, as directed by the Directors or Manager of the said Company. The said David Wilson on behalf of the Great Eastern Hotel Company Limited further agrees, in consideration of the said services to be performed by the said Owen Williams, to pay to him a weekly salary as follows : *viz.*, for the first year £3 or Rs. 30 per week, for the second year £4-10 or Rs. 35 per week, or the 3rd year £4 or Rs. 40 per week with board and lodging free, to take effect from the date of his landing in Calcutta and entering upon his duties. Should the said Owen Williams fulfil his engagement to the satisfaction of the Directors or Manager of the Great Eastern Hotel Company Limited, it is hereby agreed if he desire to return to Europe at the expiration of this agreement, the said

Great Eastern Hotel Company Limited shall provide him with a free passage, but should he wish to retain his situation, a new agreement is to be entered into by the contracting parties as at the time shall be mutually agreed, or should the Great Eastern Hotel Company Limited find they cannot work pleasantly, and feel in consequence desirous of parting with the said Owen Williams, they shall be allowed to do so by providing him a free passage to England: should, however, the said Owen Williams not complete the term of this agreement in consequence of his neglect of duty or disobedience to the orders of the Directors or Manager of the said Company, then and in that case he the said Owen Williams shall become a debtor to the said Company to the amount of fifty-eight pounds and ten shillings or Rs. 580, being the amount paid for his passage to Calcutta, together with any other sum or sums of money he may then owe, and repay the same in full on demand to the Great Eastern Hotel Company Limited. The said Owen Williams hereby agrees to enter the service of the said Great Eastern Hotel Company Limited, at Calcutta, and to fulfil the duties hereinbefore mentioned faithfully and conscientiously to the best of his ability, at the rates of salary, and for the period set forth in this agreement, with all the provisions and stipulations in the wording and meaning of the same, failing which the said Owen Williams hereby binds himself to repay on demand the amount before mentioned of £58-10, or Rs. 585. Should the said Owen Williams not wish to return to England at the expiration of this agreement, it is agreed that he shall receive the sum of £29-5, or Rs. 290-8 in the lieu of his passage money, provided he gives satisfaction to the Directors or Manager of the said Company during his service, for the due and faithful performance of the wording and meaning of this agreement, and in proof of our sincerity to abide by the terms herein set forth, we hereby in the presence of witnesses attach our seals and signatures,

David Wilson.
Owen Williams.

Witnesses,

Edmond Collisiet.
D. W. Wilson.

The plaintiff arrived in Calcutta early in January 1864, and at once entered upon his duties, receiving free board and lodging and a salary as agreed on. On the 4th of July in the same year he was dismissed, and a few days after was turned out of the Hotel where he had up to that time resided. The defendants justified the dismissal on the ground that the Plaintiff was incompetent, negligent, disobedient to order, and insolent to the Directors and the Manager of the Company. The plaintiff denied these allegations, but admitted that he had refused to look after certain Gas Pipes and Water Pipes, and to work more than 8 hours a day, contending that 8 hours was a usual day's work for Engineers in India, and that the Inspection of Gas Pipes and Water Pipes did not fall within the province of his profession.

Macpherson, J.—This action is brought to recover damages from the Great Eastern Hotel Company for the wrongful dismissal of the plaintiff from the service of the Company. The plaintiff in England entered into a written agreement with Mr. David Wilson on behalf of the defendants to come to Calcutta and serve the defendants for three years, in the capacity of engineer, and to make himself generally useful in any of the works carried on, in, and connected with the said Great Eastern Hotel Company Limited, as directed by the Directors or Manager of the Company. The plaitiff was to have his board and lodging found, and Rs. 30 a week for the first year, rising to Rs. 40 for the 3rd year. In the begining of January the plaintiff reached Calcutta and entered upon his duties. On the 4th of July he was dismissed, and a few days after, he was turned out of the Hotel premises, where he had, up to that time resided. The defendants justify the dismissal, and allege that the plaintiff was incompetent, negligent, disobedient to orders, and insolent to the Directors and to the Manager of the Company, to whom he was subordinate.

It is for the Court now to say how far it is proved that the plaintiff's conduct has been such as is alleged, or that he is wholly incompetent to perform the duties which he undertook. If the defendants have proved their case, then they were justified in dismissing the plaintiff. If they were not justified, the plaintiff is entitled to

recover very substantial damages, for I can see no case of greater hardship than that of a person of the plaintiff's class who is brought out for the first time to India, under a three years' engagement, and is then suddenly, and without having given any cause for such a proceeding, turned off before six months of his engagement are completed.

As regards the charge of incompetence, I do not think that it is established. The plaintiff may or may not be a very skilful engineer, but there is in my opinion no evidence before me on which I can find as a fact that he is either wholly incompetent, or even unskilful. Unskilfulness would not be sufficient to justify dismissal, unless it amounted to absolute incompetance. So far as I can judge, the plaintiff seems quite competent when he chooses, to apply himself to the work before him.

The charge of insolence to those whose orders he was bound to obey is two-fold. In the first place the plaintiff is charged with insolence to the Directors, present at a meeting before which he was summoned to answer complaints which had been made against him by the Manager. The insolence complained of is that of manner and tone rather than of words. I do not think that in itself would justify dismissal. I fully believe the account given by Mr. Stewart and Mr. Calder of what occurred at the meeting in question, and do not doubt that the plaintiff's conduct and demeanour were highly unbecoming and offensive. Nevertheless a solitary instance of misconduct of this description is not enough to entitle a master to dismiss his servant. And I am not prepared to say that his insolence towards Gregory is sufficient for the defendant's purpose.

I proceed to consider the issues as to negligence and disobedience of lawful orders, which really are the most important questions in the suit. Without entering into the minor instances of negligence and disobedience which have been spoken to by the witnesses, it will be sufficient for me to deal with the two principal matters, the refusal to work without extra pay for more than the 8 hours from 9 A. M. to 5 P. M., and the refusal to look after the gas pipes and water pipes in the Hotel. The plaintiff contends that 8 hours is a reasonable day's work in Calcutta, and that others of his class usually work only 8

hours here, and therefore that he was entitled to refuse to work save during 8 hours. And he contends that he was not bound to look after the gas pipes, inasmuch as such work forms no part of the business of an engineer.

I think that the plaintiff was wrong as to both of these refusals. No doubt it has been proved that persons of his class employed by Jessop & Co., by the Peninsular and Oriental Company, (in charge of work on shore), and by others, usually work only 8 hours a day. This evidence goes so far as to prove that 8 hours may be taken as a reasonable day's work, but it goes no further, being wholly inadequate to establish anything in the nature of a custom or binding rule, which necessarily is to apply to proving cases in which there is no special agreement. Moreover, the witness, Allen, says he considers himself bound to work at extra hours without extra pay when there is any special work to be done, and Mr. Shepperd, who preceded plaintiff as engineer of the Hetel, says that though he considered 9 to 5 to be his usual hours, he always worked at exta times without extra pay if there was any thing to be done. Shepperd's position, it may be remarked differs from the plaintiff's in this that he never resided in the premises. But taking it that 8 hours a day is a reasonable day's work for a man steadily employed as an engineer, that affords no rule in the present case, which turns on the special agreement between the parties and the particular position which the plaintiff undertook to fill. The plaintiff seeks to limit his duties to those falling strictly within those of an engineer. But he forgets the words of his agreement which are that he should come and serve, not only " in the capacity of engineer," but also " *make himself generally useful in any of the works carried on in and connected with*" the Hotel Company. If the plaintiff's contention be correct, what was the use of inserting the further condition as to making himsesf generally useful? And if effect be given to that condition, it is manifest that the plaintiff took upon himself duties, other than, and beyond, those of an " engineer" in the strict sense of the word. No doubt the agreement is one in which he undertook to make himself generally useful in works falling more or less within the scope of

a skilled mechanic such as is the plaintiff. I do not consider that under the agreement he was bound to attend, or assist in the shop, or to take charge of storegodowns or the like: but he was clearly bound to do any thing that was required to be done, and which was within his capacity, as regards not only the engine room and ice machines, but also the pumps, water pipes, gas pipe, and any other work of the like general description. I say any work within his capacity, because the only skill which he actually professes in his agreement to have is that of an engineer. If, therefore, he had been called to do work in any other department, and he was really incompetent to do it—as for instance, if he had been called upon to do some difficult work in gas fitting which he had never learnt how to do, and could not do, he would have been perfectly justified in saying—"That is beyond me; I never was taught that work and do not know it." But nothing of the sort occurred in this case; the plaintiff, who in fact was only asked to do work in which he was to be assisted by native gas fitters kept by the defendants, refused to touch the gas pipes, and also on one occasion the water pipes, not because he did not know how to deal with them. but because he did not consider himself bound to do it. Mr. Shepperd was not above doing such work, and Mr. Gilbert of Jessop and Co., is of opinion that any such work might will be done by any engineer.

The contract between the parties was this, that the plaintiff should come out here and live in the Hotel, and make himself generally useful as an engineer, and as a skilled mechanic, in work of a description similar to that of an engineer strictly so called. Living under the same roof as his engine, and having such an agreement as that, it is absurd to attempt to set up any right of working only a specific 8 hours a day, and that only in his engine room. No doubt he was not compellable to do more than a reasonable and fair amount of work. But I confess I am wholly at a loss to see what there is unreasonable or hard in asking the plaintiff to see the engine set to work every morning at 5 A. M., when by the very rules which ordered him to do so, and which he considered so very severe and unreasonable, ample provision is made for his leaving the engine, once it had been fairly set agoing, in charge of his native assistant. On the face of the rules,

although it is said that working hours were to be from 5 A. M. to 5 P. M., it never was intended that the plaintiff should remain perpetually with the engine: and as a matter of fact, it is proved that the intention was that the plaintiff, having started the engine, should not himself work again till after breakfast. The work which the plaintiff was engaged to do was not unremitting work of any one kind. He was to live on the premises, and work as, and when, required, so long as no unreasonable amount of work was put upon him. Here there has been no unreasonable demand of work, and no attempt to exact from the plaintiff more than the defendants were fully entitled to expect from him. In my opinion the plaintiff in refusing to work beyond eight hours a day, *i. e.*, from 9 to 5 without extra pay, broke his agreement and disobeyed the reasonable orders of his masters, and the defendants were therefore justified in dismissing him. He was further in my opinion guilty of a breach of his contract, and disobedience to the reasonable orders of his masters, in refusing to look after the gas pipes and water pipes; and on that ground also the dismissal is justifiable.—The suit is dismissed with No. 2 costs.

Suit dismissed accordingly.

REID *vs.* SCOTT THOMPSON AND CO., " LIMITED".

Master and Servant—Alleged wrongful dismissal.

Coryton with *Woodroffe* for Plaintiff.

Eglinton with *Wilkinson* for Defendants.

April 15, 1864.

This was a suit to recover the sum of Rs. 3,305-8-0 the amount of domages alleged to have been sustained by reason of wrongful dismissal from the defendants service. It appeared from the evidence that the plaintiff was engaged as an assistant, on the 17th of September 1860, by Messrs. Scott, Thompson and Co. On the 1st of April 1863, Messrs. Scott, Thompson and Co. transferred their business to the defendant Company, and the plaintiff, without any fresh agreement, continued to act as their assistant.

On the 21st of January 1864 he was dismissed. The sum named in the plaint was the amount of wages which the plaintiff would have earned, had he continued till the end of his engagement in the defendants employ. The defendants contended, *firstly,* that there was no contract between the plaintiff and the defendant Company, the proper parties to be sued being the partners in the late firm of Messrs. Scott, Thompson and Co.; *secondly,* that if there were any privity between the plaintiff and defendant Company, the plaintiff had been properly dismissed on account of his insubordinate conduct and refusal to carry out his employers orders; and *thirdly,* that the amount claimed was in any case excessive, inasmuch as before the end of his engagement, the plaintiff might find other employment which it was his duty to seek.

The following cases were referred to. *Elderton* vs. *Emmens* 13 C. B. 508, *Beckhan* vs. *Drake* 2 House of Lords Cases 606, *Smith* vs. *Thompson* 8 C. B. 44, and *French* vs. *Brooke* 6 Being 354.

Levinge, J.—In this case the plaintiff sues to recover damages for wrongful dismissal alleging himself to be the servant of Scott, Thomson & Company (Limited), and sets out in his plaint the damages. The contract is clearly a hiring for four years absolute, as appears from the letters. There has been an objection taken on behalf of the defendants that they were not bound by the terms of this contract; for, although, the plaintiff may have been a servant of the defendants, yet the contract cannot be looked to, to ascertain either the services to be rendered, or the amount of damages to be recovered, inasmuch as it was entered into between the plaintiff and Messrs. Scott, Thomson & Co., and not between him and Scott, Thomson & Company Limited). That the proper parties, if any, to be sued were Messrs. Scott, Thomson & Co., for the present Company had nothing to do with their engagement, having merely purchased the business of the previous firm. I fail to see the objection, and consider the Limited Company liable. The Company took over all Messrs. Scott, Thomson's contracts and servants on the transfer of the business, and did not hesitate to avail themselves of the plaintiff's services under the

contract. I am therefore entitled to look at the contract to ascertain the terms upon which the plaintiff served. It is also said that supposing the plaintiff made out his case, he is not entitled to recover the amount of damages he seeks. The contract was made in 1861 for four years, and it is contended that, in estimating the damages for a wrongful, dismissal, a jury must have regard to the probabilities of a person dismissed from any employment finding similar employment, and cannot award the full amount he might have earned, if he had remained till his engagement had expired by effluxion of time. Bnt if a firm brings out persons to a distant country and undertakes to give a return passage, and does not stipulate for putting an end to the contract on either side by specified notice, I think either party is entitled to the full benefit of the contract in the event of its being put an end to by the other before the expiration of the term of engagement. The question I have here to decide is, was the dismissal lawful? And in doing so I approach the issue with great diffidence, because if I find it was, it will be of the greatest moment to the plaintiff, as it will affirm that his conduct was improper, and his dismissal just. The Court will, therefore, well weigh the issue, and look at it most fovorably to the plaintiff; for if the result be against the defendants, it will not be of so much consequence to them, as it would be to the plaintiff if it were against him. A decree against the defendants would only take a few rupees out of *the till* of a prosperous firm. But the Court cannot consider which party can best afford to lose, and must be guided, in deciding whether the dismissal was wrongful, by the evidence alone. If the servant of a company, or firm, does not discharge his duty faithfully, and is guilty of such misconduct as would be fatal to good order in the establishment, and that misconduct is proved, the Court must look to that misconduct and give its decision accordingly. A servant like the plaintiff, having a respectable situation in a respectable company, should be one to set a proper example in the setablishment. No servent is bound to do an unlawful command, and is justified in disobeying it; but if the order be lawful, the servant must obey, or leave the establishment and take the consequence. I regret, for the plaintiff's sake, that I

cannot say the defendants were wrong in discharging him. I am forced to say it upon the evidence. I must say I was prepared to find against him upon his own evidence alone. It is clear that he and Dr. Ferris never got on well together. This he admits himself. On the plaintiff's own evidence there are three occasions on which he did not carry on his duty faithfully and diligently. The contract does not specify every duty he had to perform. He discharges that duty only by obeying every lawful order. The first occasion of disobedience and insubordination is that of the draught given him by Dr. Ferris, to make up. Dr. Ferris does not remember this particular instance to which plaintiff speaks; but it shows out of his own lips the line of conduct he pursued towards Dr. Ferris, who was the head of the dispensary department. What was his answer to his superior? "You are not my master; I will not be talked to in that way by you." Any master would be justified in discharging a servant who denied his authority or spoke to him in such a manner. It is contended that this matter was condoned; but I agree with Dr. Ferris: she was not discharged for one particular act, but for continued insubordination. The last drop makes the goblet overflow. The series of acts of insubordination culminated in the assault on the coachman, and he was then dismissed. Perhaps the plaintiff might have thought he could enforce his contract, and, therefore, in a measure courted dismissal. The next matter was the refusal to follow the written instructions drawn up for the regulation of the dispensing department. Dr. Barry says they were necessary regulations, and not difficult to carry out. They were, at all events, lawful orders; and if the plaintiff had any objection to them he should have remonstrated in a proper and respectful way. The evidence is that he dashed these orders down. His own statement is that Dr. Ferris was dissatisfied with him, and said that if he did not carry them out, he must get some one who would. In cross-examination he admits that he said in reply "I don't care a damn." That may not be a direct insult to Dr. Ferris as stated in the written statement of the defendants. Dr. Ferris has been sworn, and says that the words used were, "I'll see you damned first." Now, if I had to decide which words were used I should believe Dr. Ferris account in

preference to the plaintiff's. A young man who would say as much as he has admitted he did say, would be very intemperate and likely to forget what he really said. Both are highly improper, andhis masters would have been justified in dismissing him foreither. The third instance is his refusal to go to the godown department when ordered. He admits he refused at first to go, but afterwards he regretted having done so, and went. I must say the plaintiff's demeanour to-day has been most fair and candid, and he has admitted much which goes against him. Therefore I believe him when he says, though he refused to go to the godown at first that he was sorry he had refused and went almost at once. That was a legitimate order, and on his refusal he might have been dismissed. We now comè to the last matter, in which everything culminated—the assault on the coachman. That was a wrongful and improper act; but if everything rested on that alone he doubtless would not have been dismissed. The whole of his conduct whilst in the defendants' service shows great want of temper, and his language to Dr. Ferris, coupled with the assault, and all his previous insubordinate demeanour justify the Court in saying he was not wrongfuly discharged. A master has a moral duty laid upon him to protect every one in his establishment from ill-usage, and not to allow one of his servants to tyrannize over another. We have Dr. Barry's evidence also. I have already said I would be justified in decreeing against the plaintiff on his own evidence, but I was anxious to hear the defendant's evidence before I gave my decision against the plaintiff. It is true Dr. Barry has given general evidence of misconduct, and does not so much speak to particular acts of insubordination. He, however, found fault with the way in which he performed his duty in the dispensary. All that was condoned and passed over, for he was, no doubt, a clever chemist, and Dr. Barry to-day speaks highly of his abilities. It is clear he was: no fault was found with him for compounding. I would, therefore, pass by what took place whilst he was in the dispensary. But his conduct in the godown department cannot be passed over. He refused to obey Mr, Gibbon's order on the Saturday when the goods had to be packed up to be sent away. Dr. Barry Dr. Ferris, and Mr. Gibbons

say that he (Mr. Gibbons) was Reid's superior, but even to-day the plaintiff says that he does not consider his (Gibbon's) position entitled him to give him an order. In an establishment like this such insubordination could not be allowed. It would, if primitted, be subversive of all regularity and order in the conduct of business, and result in a serious detriment to the trade of the house. I have given my reasons at length for saying that this action cannot be maintained ; but I am unwilling to press too harshly on this young man, whose faults appear to be those of temper mostly. I will therefore dismisss it against him with No. 1 costs only, as perhaps it might otherwise result in his ruin, and the blow is already heavy enough. Dr. Ferris did offer to pay his passage to England : that I have nothing to do with ; but it shows the defendants are not inclined to press heavily upon him, and that they are willing to give up something. My giving costs on No. 1 scale, instead of on No. 2, will not make much difference to the defendants.

Suit dismissed accordingly.

IN THE MATTER OF JAMES HENRY CAMPBELL, AN INSOLVENT.

The Agent of a Company or private individual, who procures and receives parcels for transmission by his employers, or who by his personal exertions obtains passengers for their Dâwk, although he may be entrusted with the receipt or price of carriage, and is paid by commission, is not a broker, or trader, within the meaning of the Insolvent Act.

The Insolvent in this case was a retired Member of the Civil Servic, and had been for some time since his retirement, Agentto a Dâwk Company. He now applied for his final discharge, and the question was raised as to whether he was a *trader*, within the meaning of that term in the Act.

Levinge, J.—The matter of this petition coming on this day, Mr. Stokoe in behalf of the Insolvent, applied under the 60th section of the Act relating to Insolvent debtors in India (11 Vic. c. 21), to make the order absolute for the discharge of the Insolvent in the nature of a certificate. The provisions of the Act appear to have been complied with, which direct the notices to be published in the *Indian* and *London Gazettes* and I am asked to declare that the applicant is a trader within the meaning of the Act. June, 18, 1864.

Traders under the Indian Act are defined to be—persons who under 6th G. iv., c., 16 or 5 and 6 Vic c. 122, or any Act thereafter to be passed, would be deemed to be traders. Reference may therefore be made to the 12 and 13 Vic. c. 106, s. 65. which adopts the catalogue of persons liable to become bankrupts contained in the above mentioned Acts. Section 65 is as follows :—"All alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cow-keepers, dyers, fullers, keepers of inns, taverns, hotels or coffee houses, lime burners, livery stable keepers, market gardeners, millers, packers, printers, ship owners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, persons insuring ships, or other freight, or other matter against perils of the sea, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment or ortherwise, in gross or by retail, and all persons who either for themselves, or as agents, or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupts, provided, &c. &c."

The description the Insolvent gives of himself in his schedule filed on the 21st day of August 1860, is as follows :—"The schedule of James William Henry Campbell, heretofore member of the Bengal Covenanted Civil Service, and lately and at the time of his arrest a

Commission Agent for procuring passengers and goods for transmission by a horse Dâwk Company."

It is stated that the Insolvent had an office for the purpose of booking passengers, and receiving and forwarding parcels, goods and merchandise for transmission by the Company whom he served. Now a trader generally has been defined to be a person who seeks his living by buying and selling, (*vide* 12 and 13 Vic. c. 106 s. 65,)—manifestly a definition wholly inapplicable to the description given by the Insolvent of his own pursuits, and mode of gaining his livelihood. Reference must, therefore, be had to the several statutes passed, defining traders, to see if the Insolvent can bring himself within any of the different calsses, specifically enumerated as traders. He has been described to me as a mere servant or agent of the Dâwk Company, receiving in lieu of wages, a commission or percentage on the amount paid by the passengers, or for the freight of the merchandize and parcels. When an agent is mentioned in the Bankrupt Acts, it is an agent for buying and selling, and not a mere agent for the purpose of carrying on the business of some private individual, who himself may be a trader. The only term in the above section, under which it has been suggested that the Insolvent will come, is that of "broker," and the Insolvent has been likened to a ship-broker who effects contracts for freight; and the case of *Pott* vs. *Turner* 6 Bing. 702 has been referred to, where it was ruled "that a broker is one who makes bargains for another and receives a commission for so doing, as for instance a stock broker. But in common parlance one who receives the payment of freights for the ship owner and negotiates for cargo, is a broker." This case also shows that the sentence in the above section, "receiving other men's monies or estates into their trust or custody" is adjective to banker, broker, &c, &c., and is not confined to the substantive "scrivener." But although that case decided that a person carrying on generally, and for his own benefit, the business of a ship broker, and who receives a commission from any number of ship-owners for finding cargoes for ships, and who was entrusted with the receipt of freight, was liable to be made a bankrupt, as falling within the definition of "broker," I cannot hold that the agent of a Company

or private individual, who procures and receives parcels for transmission by his employers, or who by his personal exertions obtains passengers for their Dâwk, although he may be entrusted with the receipt of the freight or price of carriage, and is paid by commission, is a *trader, or broker*, within the meaning of the Act, and I must, therefore, refuse this application.

Application refused.

IN THE MATTER OF SREENARAIN BYSACK, an Insolvent.

The annulling of the fiat contemplated by the proviso of 11. *Vic., c.* 21, *s.* 8, *applies only to cases in which the original judgment has been the result of mistake of fact, misapprehension, or fraud.*

In this case a party, after lying in prison for 21 days, had been adjudged an Insolvent, in accordance with the provision of Sec. 8 of the Indian Insolvent Act, on the *ex-parte*, statement of a petitioning creditor. An *ex-parte* application was now made under the same section (after notice to the petitioning creditor), to annul the adjudication, on the ground that the debt had since been paid, and that none of the creditors opposed. Oct. 27, 1864.

Phear, J.—I consider that the circumstances of this case are not such as to give the Court jurisdiction to annul the adjudication. The power of annulling given by the proviso of the section, merely applies where the original adjudication has been brought about by mistake, misapprehension, or fraud. Unless it can be shewn that the adjudication is bad, the machinery of Insolvency must be allowed to take its course. If the adjudication is good and valid, all the creditors, whoever they may be, are entitled to what the law conceives to be the benefit of it; and, therefore, it is that at the subsequent hearing, two publications in the Gazette of notice to creditors are required, while this proviso merely directs that notice shall be given to the petitioning creditor.

Application refused,

TEENARAM *vs.* RAMRUTTON.

Applications under Secs. 74 and 75, Act VIII on the ground first mentioned in Sec. 74, must shew, at least, that defendanl is about to leave the Jurisdiction with a view to avoid process, or to delay the plaintiff in the prosecution of his suit. Evidence sufficient to support this must be adduced in all cases.

Warner for applicant moved under Sec. 75 Act VIII for a warrant to arrest defendant under the following circumstances. It appeared that the plaintiff had accepted a Bill for the accommodation of the defendant who was one of the members of a firm carrying on business in Calcutta. On the Bill coming to maturity, the acceptor had been obliged to pay, and upon calling on defendant to reimburse him, he discovered that the place of business of the firm was shut up, and was unable to find defendant. Oct. 28, 1864.

Phear, J.—In this case I am not satisfied that the defendant is about to leave the jurisdiction with intent to avoid process, or to delay the plaintiff in the prosecution of his suit, without which circumstances, at least, the Court has no jurisdiction to grant a Warrant. For it is not contended here that the dofendant is removing his goods within the meaning of the section. The plaintiff has however made out a case of considerable suspicion, and I will grant a summons, calling on defendant to shew cause, why he shonld not give security to answer any judgment, which may be given against him in the suit. Possibly, the circumstances connected with the service of this summons, may furnish information which may enable me to grant the application originally made.

Two days afterwards *Warner* renewed his application, producing an affidavit which set forth that an unsuccessful attempt had been made to serve the summons, that the defendant and his partner were still out of the jurisdiction, that their place of business was entirely closed, and that none of the people in the neighbourhood knew where they were. The affidavit stated, moreover, that the summons had been posted up at the door of the defendant's house.

Phear, J.—I consider that the facts now adduced, combined with those laid before the Court in the first occasion, and the fact that the defendant has failed to appear, are sufficient to justify me in granting the application. The warrant may issue.

Application granted accordingly.

RAMMONEY DOSSEE *vs.* BRIOJOLOLL DAY.

In all suits under Act VIII, the party on whom the burthen of proof rests is entitled to begin, whether such suits be of the nature of suits in Equity, or of suits at Common Law.

This was a suit for partition. The defendant set up a will, and in her written statement admitted that the plaintiff was entitled to what she claimed, should the will not be established. Aug. 12, 1864.

Woodroffe, for defendant, claimed the right to begin. The burden of proof rested on the defendant, and the defendant was, therefore, entitled to begin. This had been ruled in the case of *Sreemoney Dossee vs. Hurrakisto Daw,* which was a suit in the nature of a suit in Equity.

Graham, for plaintiff, admitted that defendant would have been entitled to begin had this been a suit in the nature of an action at Common Law. But this was in the nature of a suit in Equity, and the plaintiff was, therefore, entitled to begin. The cases in which it had been ruled under the new procedure that the defendant was entitled to begin, were cases in the nature of actions at Common Law.

Macpherson, J., said, that under Act VIII no distinction could be drawn between suits in the nature suits in Equity, and suits in the nature of actions at Common Law. It was allowed that the right had been claimed and admitted in some cases, and there was no reason why it shonld not prevail in all. The defendant must be allowed to begin.

RAMNARAIN PODDER *vs.* EZEKIEL LEVY

In an Application made under Sec. 81, *Act VIII, the Court must be satisfied that a removal of goods is being made, or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal.*

Lowe for the applicant moved to enter a plaint on the ground of urgency, and asked for an order calling upon the defendant to fornish fufficient security to fulfil any decree which might be passed against him under the provisions of Sec. 13, Act VIII. Oct. 26, 1864.

It appeared form *viva voice* evidence taken before the Judge, that defendant carried on buisness as a Merchant, his practice being to buy from time to time rice, jute, and such like commodities, and to sell them immediately to shippers taking the goods straight from his vendor to his vendee, without putting them intermediately in to any godown. Several plaints had been filed againts the same individual. The period of credit had in each case elapsed, and upon the vendors attempting to get their money, they found defendant's office closed, and that he was not to be found. Upon these grounds the application was made.

Corylon opposed on the ground that the defendant's dealings with his property were merely in accordance with his ordinary course of business, and not a disposal of it, or of any portion of it, with a veiw to any prospective execution.

Phear, J., said, that he would admit the plaint, but must refuse the other portion of the application. He thought that in cases of this kind the Judge must be satisfied that the removal or disposition of property complained of by the defendant, was about to be made with a view to evade or delay the execution of a decree, which the defendant anticipates the Plaintiff may obtain against him in the specific case. It was not necessary that the suit should be actually commenced, but merely that defendant should be acting on the supposition that it would be. The cricumstances in this case

did not disclose any such intention on the part of the defendant. The application must, therefore, be dismissed with costs.

Application dismissed accordingly.

PRINCE, GOLAM MAHOMED *vs.* THE CALCUTTA CLUB.

Under the New Procedure the Court will not entertain an application on Summons for the discontinuance of a Suit.

This was a suit praying for declaration that the defendants had forfeited their right to the lease of the premises occupied by them in Chowinghee Road, on the ground that they had neglected to pay months rent for more then ten days after it became due, which it was provided under the lease should work a forfeiture. Sept. 15, 1864.

Eglinton, for defendants moved upon summons, that the suit be discontinued on the defendants paying to the plaintiff the rent due together with all interest and costs incurred by the plaintiff up to date. The rule in Equity was to relieve against a forfeiture for the non-payment of rent, when the lessee paid what was due. Such an application might, under the old system, be made upon summons, and there was nothing in the procedure under Act. VIII to change the practice.

Woodroffe, for the plaintiff objected on the ground that no affidavit had been filed making a case for the defendants upon the merits, and that the wording of the lease took the case out of the general rule of Equity. Under the new procedure there was no authority for such an application being made upon summons.

Macpherson, J., said he entertained no doubt but that the forfeiture ought to be set aside on payment of whatever was due. He was not, however, satisfied that such an application could be made on summons under the present procodure of the Court. The proper way seemed to be to raise the question at the hearing, when if the plaintiff appeared to have persisted in proceeding after an offer of this kind had been made to him, it would be for the Court to say whether he would be entitled to any costs accruing after such offer. The motion must be refused : the question of costs would be reserved till the hearing.

Application refused accordinply.

Ewing and Co. *vs.* Grant, Smith and Co.

The ground upon which a person is restrained from using another's trade mark is, that he is gaining an advantage by the use of a particular trade mark, which is the property of another. It is not necessary to prove intentional fraud, or to shew that persons have been actually deceived. It is sufficient, if the Court be satisfied, that the resemblance is such as would be likely to cause the one mark to be mistaken for the other.

The *Advocate-General* with *Woodroffe*, for the Plaintiff.

Eglinton with *Paul*, for Defendants.

This was a suit brought by the plaintiffs to restrain the defendants from selling a certain description of goods known as "Turkey-Reds," with a ticket or device bearing an elephant affixed thereto, which the plaintiffs alleged to be a colorable imitation of a certain ticket to the exclusive use of which they claimed to be entitled. The case was partly heard last year before Sir M. L. Wells, (*Hyde's Reports for* 1863 p. 1), but the evidence which was then given being very conflicting, his Lordship adjourned the case, in order that a commission might be taken out for the examination of certain parties in Scotland. That commission having been returned, the case was now tried upon the whole of the evidence.

Levinge, J.—The plaintiffs sue for an injunction to restrain the defendants' firm from using on Turkey-red dyed goods, trade marks, or tickets, alleged to be colorable imitations of the trade mark of Archibald, Orr, Ewing & Co., of Glasgow, fixed by them upon their Turkey-red dyed goods imported into India, and sold by the plaintiffs as their agents.

March 21st, 1864.

The plaintiffs and defendants are both Commission Agents; the defendants acting in Calcutta for the firm of Sterling and Co., of Glasgow.

The plaintiffs say that A. O. Ewing and Co. have been in the habit of importing their Turkey-red dyed goods into India marked

with a peculiar trade mark, stated by the witnesses to be known in this market as the "Hathee ticket," being a device of an elephant carrying two men, printed in gold on a green ground, with the words "Warranted Turkey Red," printed over the device of the Elephant. The plaintiffs allege that this trade mark has been used by them for a period of about 14 years, and long previous to the use by the defendants of the colorable imitation complained of. They further charge that the trade mark used by the defendants is calculated to deceive native dealers and others, by its general resemblance to that of A. O. Ewing and Co.'s, and thereby to prejudice the sale of their goods.

The plaintiffs, in their written statement, allege, that in November 1860, Sterling and Co. sent to Messrs. Schoene, Kilburn and Co., of Calcutta, Turkey-red dyed goods, bearing a label very closely resembling that used on the Turkey-red dyed goods sold by the plaintiffs. That the plaintiffs threatened to apply for an injunction, but Schoene, Kilburn and Co. agreed to remove the ticket, and Sterling and Co. acquiesced in this. They say, beyond that infringement, they never heard of any further or other attempt until the 20th February 1863, when they found that a colorable imitation of their Hathee ticket was being used upon Turkey-red dyed goods received from Sterling and Co., and sold by the defendants, and the plaintiffs believe that the difference between the two tickets is not such as would strike natives, unacquainted with the English language, who are the principal buyers of such goods.

The general nature of the defence to this suit is to be found in the written statement put in by Mr. Steel, a partner in the firm of Grant, Smith and Company. He alleges that it is not the fact that by the use of the Elephant or Hathee ticket, every merchant or dealer, European or Native, would understand to be meant goods, imported by Ewing and Co. Also, that there have been for many years several kinds, both of Turkey-red dyed and other piece goods bearing the Elephant tickets, sold in Calcutta by different firms here, as agents for parties in Europe. I shall at once observe that there

is no complaint made, nor any issue raised, as to the use of any marks bearing a design of an Elephant device on any other species of goods than Turkey-red, and the complaint is solely confined to the use of a colorable resemblance to the Elephant ticket used on Turkey-red dyed goods imported by Ewing and Co. Mr. Steel goes on to allege, that the device of an Elephant, as the mark on piece goods of all descriptions is a very common device, and is, by no means, confined to Calcutta, but is very extensively affixed on piece goods shipped to all ports in the Indian seas. Here, again, I would observe, that there is no issue raised as to the use of an Elephant mark that does not resemble or closely imitate the plaintiffs', nor any complaint of its use elsewhere than in the Calcutta market, and no proof has been given of the use of an Elephant mark resembling that used by the plaintiffs, and so imitated as to be calculated to mislead in any other market in India. Supposing that the defendant could establish the use of the mark complained of in goods imported to China, or any ports in the East, they would have to establish the use with the knowledge of the plaintiff. If they could do so, it would be some evidence of an acquiescence in the right of the defendants, to the use of a similar mark, in whatever market they pleased to send their goods, marked with A. O. Ewing's trade mark. But there is no distinct evidence on the record to support such a case.

These observations are, of course, to be taken subject to the question, whether the plaintiffs can sustain by proof a prior title or right to use this peculiar trade mark. If they can, then undoubtedly they acquire a property in this peculiar Hathee ticket as their trade mark on their imported Turkey-red dyed goods into the Indian market, and they can successfully call on the Court to prevent the use of any mark closely resembling theirs, and manifestly calculated to mislead purchasers.

The most convenient form I can adopt in giving judgment is first, to address myself to the law relating to trade marks, and bearing on the issues to be decided in this case, and afterwards

discuss the evidence and material facts put forward on each side. There has been some discussion during the progress of this case as to whether there can be a property in a trade mark ; but I do not consider that question of much importance, one way or the other, in deciding the suit. V. C. Page Wood is reported to have stated (*vide Collins & Co.* vs. *Brown, 3 K. and J* 426) that "it is now settled law that there is no property whatever in a trade mark, but that a person may acquire a right of using a particular mark for articles which he has manufactured to the exclusion of every body else". And Sir John Romily, in *Hall* vs. *Barrows* (9 Jur. N. S. 483, also reported in 32 L. J. Ch. 548) gives his opinion on this point with great force :—"It is clear", he says, " from a variety of decided cases, that a manufacturer, who has originally stamped his goods with a particular brand, has a property in his mark at law, and can sustain an action for damages for the use of it by another. It is also clear that Courts of Equity will restrain the use of it by another person. It has sometimes been supposed, that a manufacturer can only acquire such a property in a trade mark, as will enable him to maintain an injunction against the piracy of it by others, by means to a long-continued use of it, or at least, such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a Court of Equity cannot, it appears to me, depend on the length of time the manufacturer has used the mark. If the brand or mark be an old one formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such property in it, or prevent others from using it. But provided it has been originally adopted by a manufacturer, and has been continually, and still is used by him, to denote his own goods when brought into the market and offered for sale, then, I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbours cannot use that mark ; were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation it had acquired, a very difficult, if not insoluble enquiry would have to be opened in every case, *viz.* whether the mark had acquired in the

market a distinctive character denoting the goods of the person who first used it. The adoption of it by another is proof, that he considers it likely to become beneficial. If the manufacturer, who first used it, were not protected from the earliest moment, it is obvious that malicious and pertinacious rivals might prevent him from ever acquiring any distinctive mark or brand to denote his goods in the market, by adopting his mark, however varied, immediately after its adoption or change by the person who originally used it. This evil would not be avoided by putting his name in full, for, if the name of the manufacturer were a common one, it would be difficult for him to point out to the public what goods were or were not manufactured by him." Such is the opinion of Sir John Romily. I consider the law would recognize no property in the fanciful creation of a mark or ticket intended to be used as a trade mark, and not followed up by a user; but that, after the use of an original mark on the manufacturer's goods in a market, no matter for how short a time, a property is acquired in the trade mark sufficient to disentitle any person to pirate it with impunity, and this property would continue until it has been proved by evidence that the proprietor has abandoned it. Once having established by evidence a distinct and sole use of the mark, no one else has a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. As stated by V. C. Page Wood *(see Collins and Co.* vs. *Brown, p.* 427), the simple question in these cases is,—"has the plaintiffs, by the appropriation of a particular mark, fixed in the market where his goods are sold, a conviction that the goods so marked were manufactured by him? and if so, and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it." A. O. Ewing and Sons, as I shall presently point out, appropriated the trade mark in 1845, and first used it in the Calcutta market, and in 1852 improved upon it, and thence downwards acquired by use, the exclusive right to their Hathee ticket, the gold Elephant on the green ground, and thus are clearly within the principles laid down in the above authority. Again,

intentional fraud is not necessary to be proved in these cases, and it would, he observed, if it was for the use of the mark itself, mislead the public into the belief that the goods were the manufacture of the trader, who had, by use in the market, acquired the exclusive right to the trade mark; *see Edelston* vs. *Edelston* 9 Jur. Ch: . 479. In *Cartier* vs. *Carlile,* 8 Jur. N. S. 184, Sir John Romily holds that if it be found that the mark complained of, is a colorable imitation of the plaintiff's mark, it is quite immaterial whether the defendant intended to imitate it, or whether he knew that it belonged to any particular individual. The ground upon which a person is restrained from using another's trade mark is, that he is gaining an advantage by the use of a particular trade mark, which is the private property of another. If that principle were not followed, a man might imitate the mark of another person of great value, taking care not to know anything about it himself or to whom it belonged. That Sterling and Sons did intend to imitate the plaintiffs' mark in 1859, I shall show beyond all doubt, and they carried their intention into effect, and I have no doubt the same intention existed in 1855 and in 1857, and throughout the whole course of conduct pursued by them. It is also clear that the plaintiffs have a right to follow the colorable imitation to any country where they have acquired the exclusive right to the user, and restrain any person in that mark, although he may be perfectly innocent of any fraudulent design; on the principle that any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded. The case of *Blanchard* vs. *Hill,* 2 Atk 484, heard before Lord Hardwicke, where he refused to restrain the defendant from making use of the great Mogul as a stamp upon his cards, has been cited before me by Counsel for the defendant, and Lord Hardwicke seems to hold that an injunction will only be granted, when the use of the trade mark is being made, with the fraudulent design of putting off an inferior article on the public by this means, or to draw away customers from another. But it will be seen from the cases I have mentioned, and the principles to be adduced from them, that the above case does not exactly represent the true state of the law, and would not, as stated by Sir John

Romily in *Hall* vs. *Barrows* be followed at this day, notwithstanding the high authority of Lord Hardwicke's name, to the extent to which it was carried, and on the grounds on which it is then rested. Lord Westbury has held in a very recent case (*Edelston* vs. *Edelston*) that it is not necessary for relief in Equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark under the belief that they were of the manufacture of the plaintiffs, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. I mention this principle as it was alleged in the course of the argument for the defendants, that the plaintiffs had not proved that they had been injured in their trade, nor had they produced any witnesses from the Bazar to prove that they had been deceived.

I shall now turn to the evidence. I have no doubt, whatever, indeed there is no room to doubt, that A. O. Ewing & Co., first used the gold Elephant on the green ground, which I shall in future call the *Hathee* ticket, on Turkey-red dyed goods imported into the Calcutta market. Prior to the year 1852, a very material date in this suit, they used a mark bearing a device of 4 gold Elephants on a green back ground. This is Exhibit "L." Whether that ticket, which in dimensions is precisely the same as the trade mark now used, was placed on their goods as one ticket, or distributed into four, there is no evidence. If parted into 4, each ticket would then be a *fac simile* of the one used by the plaintiffs in 1852. This partition of the ticket into four is only a suggestion of the defendants' Counsel, supported by the not very satisfactory evidence of Mr. Robert Scott, taken under the Scotch Commission. When on cross examination he says—"If we used the ticket marked "L" at all, it might have been used in 1852 and onwards, because we always had small tickets of the same design as the large ones. If used at all it might have been for two or three years." This is not positive evidence, and does not refer to the mode of use prior to 1852. Mr. Scott, on a subsequent day, however, proved an extensive use of the ticket L, but in what form he does not say, by A. O. Ewing & Co., since 1846,

and produced the engraver's bills and receipts for many thousands. Mr. Miller, a partner of the firm of A. O. Ewing & Co., also proves that ticket "L" was used on goods sent to Calcutta by his firm during the whole time he was partner, *viz.* from June 1845 to June 1855.

It is important to notice that A. O. Ewing and Co. first started in business in the year 1845, and the block from which ticket "L" was taken, was designed and engraved prior to the year 1841; hence the defendants take up a strong position with regard to the trade mark. They prove that, prior to 1852, it was supplied to other Glasgow Houses than to A. O. Ewing and Co., and it is clearly proved that it was, and that it existed before that firm was founded. But there is no proof that it was used for the Indian market by any firm, other than A. O. Ewing and Co., or any proof given of its use any where else. Hence, there does not appear in the evidence any bar to the plaintiffs' acquiring a property in this mark, by actual use. The mere designing a trade mark, unless followed up by a user, confers no property in the mark.

I come now to deal with the next material evidence relating to the plaintiffs' right to the exclusive use of this mark. It is satisfactorily established that A. O. Ewing and Co., in the year 1852, had engraved and thenceforth used the trade mark, Exhibit A, which is apparently an enlargement of one of the four Elephant designs on Exhibit L. This trade mark they continued to use on goods shipped to Calcutta down to May 1860, and in the trade mark they insist they have acquired such property either from 1852, or the first user of Exhibit "L" in the Calcutta market, as will enable them to prevent any infringement or use of any colorable imitation of the mark by any other firm. Ewing and Co. made a further change in the ticket, not in any way altering its character as their distinct trade-mark, but apparently for better security, and as affording an additional warranty to dealers, both European and Native, by affixing their names in English, Bengalee, and Nagree, on the label. This addition to the label which, in my judgment, does not affect the already acquired title to the use of Exhibit A, or any

ticket resembling it, was made on the 2nd day of May 1860, and the label is now the one in use by them. So much for the plaintiff's proof of the user of the *Hathee* ticket. A large body of evidence has been given relating to the use by the plaintiffs of a smaller ticket varying at different times, simultaneously with the larger ones, and it has been argued that this shews they had no defined ticket, or that they set up no right to any particular mark; but I have no hesitation in holding that they had a perfect liberty to resort to as many sizes as they pleased, or to the alterations they effected in the ticket, without parting with their acquired right to the exclusive use of the *Hathee* ticket, for none of these changes really or materially altered the leading characteristics of the ticket, or made it the less Ewing Company's trade mark for their Turkey-red dyed goods, and it will be seen on reference to *Hall vs. Barrows* that I am supported in that view by the authority of that case. With these observations I dispose of the evidence as to the small tickets. As to the multitude of other and different Elephant marks produced to the Court, they have but little to say to the merits of this case, many of them not even approaching to a resemblance of the plaintiffs' trade mark. I have disposed of the defendants' evidence as to the use of Exhibit L. There is no attempt shown by the evidence to establish a title to an Elephant mark resembling the plaintiffs' until the year 1355, from which date they allege a right and property in a trade mark resembling in all its general features the one used by the plaintiffs since 1852, down to the present day. They cannot fall back on the use of Exhibit "L," for there is no evidence that they or any one else, save the plaintiffs, have used the mark in the Indian market, and for ought the Court can tell from the evidence, it may never have been placed on a single bale exported to any market in the world by any other firm. The mark engraved for Sterling and Co.'s use in 1855, is Exhibit "A-A" very closely resembling Exhibit "F," the mark complained of. The defendants prove the engraving of this ticket in 1855, and produce the drawing from which it was taken. I have no hesitation in finding as a fact, that exhibit "A-A" so closely resembles the trade mark of the plaintiffs in the general features, as to be a colourable

imitation of their trade mark. The designer of this so-called original trade mark states, to use his own words, that he was *aided* in making the design from impressions contained in the *Illustrated London News* of, I think, 1854, but I am not sure of the precise year, and I candidly confess, I think the additional aid he obtained was from the plaintiffs' mark, no matter from what source he procured it, in Glasgow. Supposing that the mark or ticket when completed resembled by accident the trade mark of the plaintiffs, that, I apprehend, would be no decision to this suit, inasmuch as the use of a similar trade mark, innocently and without fraud, by the defendants, subsequent to the acquired property in the plaintiffs, ought to be restrained on the ground that it is calculated to mislead the public and injure the plaintiffs. Ticket "F," complained of very nearly resembles exhibit "A-A," but the alteration is scarcely noticeable, and I believe has been effected by an erasure and the filling up two or three small palm trees. I have now to allude to two other tickets put forward by the defendants, and which are material to notice, *viz.* "C" and "G-S." Exhibit "C," I am now justified in saying, is not distinguishable from the plaintiffs' trade mark Exhibit "A," except upon a very minute examination. It was the use of this ticket in 1860 in the Calcutta market which first came to the plaintiffs' knowledge, and up to that date there is no reliable evidence on the record, that Sterling and Sons ever introduced Turkey-red dyed goods into the Indian market with any of the marks previously mentioned, although there is a general statement of Mr. Steel's to the contrary, to which I shall presently have to advert. Mr. Yule has stated that he had seen ticket "F" sent on goods exported by Sterling and Sons to the East, but gives no date, and does not say whether it was used on Turkey-red dyed goods, or that the goods were sent to the Indian or Calcutta market; and on reference to the body of testimony given for the plaintiffs, I allude to the evidence of Mr. Kilburn, Mr. Williamson, Mr. Mackey, and Mr. Grant, all lead to the one conviction; *viz.*, that before 1860, Sterling and Co. did not attempt to dispose of their Turkey-red dyed goods bearing a trade mark resembling the plaintiffs; on the contrary, it would appear, they used a pelican, and a vase, or some other design on their Turkey-reds.

It appears to me to be clear, when first Sterling and Company thought of using the trade mark closely resembling the plaintiffs', as well as their object. Messrs Lyall, Rennie and Co., were Messrs Sterling and Co.'s agents in the year 1859, and wrote a letter to them, dated the 8th September 1859. This has been produced, and given in evidence with Sterling and Son's reply thereto, dated the 3rd November 1859. Messrs. Lyall, and Rennie, after calling attention to the subject of the tickets used by Sterling and Sons, and stating that " your T. R. Mulls likewise do not meet with much attention, but this is attributable partly to a change in ticket, the one now used being a Buffalo's head, whereas the one you used formerly went by the name of the Horse ticket, on account of the design it bore, and was well known in the market. A change of ticket should never be made, unless particularly pointed out by us, as doing so often proves injurious to the sale of the goods," go on to give the following suggestion :—" *We enclose a ticket now used by Ewing and Company; it is a great favourite, and we would recommend your adopting something of the sort for all your goods with the exception of the sarries, scarfs and handkerchiefs.*" The ticket enclosed, is plaintiff's Exhibit A." Sterling and Sons in answer, acknowledge the receipt of that letter, and state they have given their best attention to its contents; it also contains the following passages :— " We would also wish you to keep your eye closely on the imports of Ewing and Co. and at all times send us home samples of any patterns or style that may be preferred to ours." * * * *Respecting your remarks in the letter of 8th September on the change of our ticket, Mr. Wright has written for them, and we have only further to say that we are getting ready a close imitation of the favorite Ticket you enclosed, and which we intend to adopt in future.*"

After that letter, what becomes of the argument put forward, that the ticket Exhibit " C " which came out subsequently on Sterling and Sons goods, was not an imitation, and what becomes of the defendants arguments that Sterling and Sons had acquired a property in their trade mark in 1855, or earlier, in the face of an avowed ad-

mission that they prepared a trade mark in 1859 to closely imitate the plaintiff's trade mark? To the eye of any person, European or Native, this trade mark "C," as well as Exhibits "F" and "G. S.," are what they professed to be,—trade marks calculated to deceive Native dealers and others by their general resemblance to that of the plaintiffs, and were used in this market, not accidentally, or as the *boná fide* trade marks of Sterling and Sons, but by design and arrangement, and I endorse the statement of V. C. Page Wood in *Collins & Co.* vs. *Brown*. Short of indictable offences, nothing can be more discreditable than this course of proceeding. The plaintiffs became acquainted in January 1861 with the use of Exhibit "C" on Sterling and Sons' Turkey-red dyed goods, sent to their agents Schoene, Kilburn and Company, and wrote a complaint on the 7th day of January to Sterling and Sons, and on the 8th received a reply in reference to the complaint, and I cannot avoid alluding to this correspondence. They state in this letter the following excuse: "On examination we find that the goods referred to were an order we had received, but which owing to late delivery were thrown on our hands; we were consequently induced to ship them on our account, and, as in doing so, we wished to avoid our usual mark, without, however, intending to interfere with the mark of any other house, our shipping clerk adopted the one in question. We had no intention of following out the mark and ticket, but now that the matter has been brought before us, you may rely that we shall not again recur to them."

Now, what does this letter prove? To my mind, first, an admission of an infringement of the plaintiffs' trade mark; secondly, the admission of the use of a different usual trade mark by Sterling and Sons on Turkey-red dyed goods; thirdly, an admission that A. O. Ewing and Co., had a property in the trade mark infringed, and fourthly, I regret to say, that it convinces me that the firm of Sterling and Sons were not acting fairly and honestly in the matter. Reading this letter with their former letter of the 3rd November, 1859, would any person of ordinary intelligence believe that the trade mark was placed on the bales delivered in Calcutta in 1860,

for the reasons set out in Sterling and Co.'s letter of the 8th January 1861? I think their conduct is highly blameable. After that letter I protest I cannot see what ground the defendants have now for alleging that the plaintiffs acquired no title in the trade mark. But I have other matters that I am obliged to advert to before I can close the full consideration of the evidence. After the withdrawal by Sterling and Sons of the ticket "C.," the plaintiffs heard no more of any attempt to infringe their trade mark until December or January 1863, when they learnt that the defendants were selling Turkey-red dyed goods imported by Sterling and Sons bearing an Elephant ticket, closely imitating their trade mark. The mark complained of is Exhibit "F."

As to the identity of the trade mark used by them, the defendants endeavour to show that the plaintiffs are not exactly aware of what ticket they impeach, and as proof, they show that Mr. Murdock identified Exhibit "G-S" as the one complained of, which has Wm. Sterling and Sons, engraved on it, whereas, Mr. Ewing under the Scotch Commission swore that "F" was the one complained of. But ticket "F." was put into his hands. On examination I must say it was most natural he should say it was the one complained of, as they so nearly resemble each other. Both, or either, are, in my opinion, colourable imitations of the plaintiffs' trade mark.

I cannot pass over the evidence given by Mr. Steele without observation, inasmuch as he goes further than any other witness in attempting to make out a case for the defendants. Mr. Steele asserts in his affidavit sworn to oppose the injunction, that "Sterling and Sons have for the last 10 or 12 years used on Turkey-red dyed goods, shipped by them to Calcutta for sale, the ticket complained of, and which is annexed as Exhibit "G-S" to Henry Murdock's affidavit, and I myself during that time have known the said ticket so now complained of, on goods so sent out to this and other Indian markets by the said Messrs. Wm. Sterling and Sons." If this statement of Mr. Steele was supported by any evidence, it would make a strong case for the defendants, but it seems to me to be

wholly destitute of foundation. There is no evidence to show that Sterling and Sons sent Turkey-red dyed goods to the Calcutta market with any mark resembling the plaintiffs, before 1860; again, "G-S" is certainly only a reproduction of Exhibit "F," which Yule has proved to have been produced in 1857 from the design "A-A," engraved in 1855. I have little doubt that after the compulsory withdrawal in 1861 of Exhibit "C," the defendants fell back on Exhibit "F" or "G-S." If "G-S." as alleged by Mr. Murdock, and the use of which is sought to be restrained, it was the old mark with the addition of Sterling and Sons placed on it, and the blotting out of two small palm trees, under the Elephant's trunk, or if Exhibit "F," as attempted to be shewn on the cross-examination of Mr. Ewing, it was the ticket as reproduced in 1857. So Mr. Steele's evidence as to the use of this ticket for the last 10 or 12 years cannot be relied on, and it is to be regretted that the same assertions are to be found verified in his written statement filed in this cause. Looking then to the ticket complained of, and to the evidence in this cause, I have no hesitation in holding that the plaintiffs have, ever since the formation of the firm, established a right to the use of the Hathee ticket proved in this case, and that the mark used by the defendants is a colourable imitation of the trade mark belonging to the plaintiffs. I, therefore, direct a perpetual injunction against the defendants to restrain the use of the plaintiffs' trade mark. The defendants to pay to the plaintiffs costs to be taxed on scale No. 2

Decree accordingly.

S. M. BAMASOONDERY DOSSEE *vs.* NILMONEY CHUNDER AND OTHERS.

Exceptions to Master's Report.

The Advocate-General with *Newmarch* and *Woodroffe*, for plaintiff.

Eglinton with *Hyde*, for defendants.

The plaintiff in this case was the widow of one Mudoosoodun Chunder, who was the son of one Ramtonoo Chunder and brother of the defendants. The brothers had lived

August 8th, 1864.

joint in food, worship, and estate. The object of the suit was to establish the Will of Ramtonoo, and to ascertain the plaintiff's rights therein.

On the 19th of August 1861, it was referred to the Master to take an account. He reported that at the death of Mudoosoodun his one-fifth share of the accumulations and increase of the joint property moveable and immovable of Ramtonoo, amounted to Rs. 87,227-12-11. This report was excepted to by both parties, and the case now came on for argument upon exceptions.

Peterson, J. Before I decide upon any of the points mentioned in my minute of the 10th ultimo, I think it right to remark on the evidence, oral and otherwise, given by the defendants in respect of the items on which I required information, and as to the general mode in which the case has been conducted by the defendants. This case was referred to the Master as far back as the 9th of August, 1861. The defendants, the accounting parties, filed their first state of facts on the 17th day of January 1861 : they kept filing in pursuance of the orders of the Master further and better states of facts, delaying the suit in every way. The facts relating to the account of the estate after Mudoo's death were filed in March 1863, and subsequently mentioned. The state of facts relating to the estate, at the different statement of facts filed, are throughout, as far as I can see, full of false statements. With regard to one item in the account of Ramtonoo's estate, namely, the charge of a very large sum for pickaxes, I have already, in my remarks on the exceptions filed by the plaintiff and defendant, made some comment. No doubt there is some excuse for inaccuracy, in respect of states of facts relating to the years, when the books of account were destroyed by damp, and white ants (on which point I shall have to make some comments), but there can be no excuse as to false suggestions in respect of accounts when the books are in existence, and where, in such cases, false suggestions are made, they must, in my opinion, have been wilfully made for some improper motive. Unfortunately, states of facts are not put in on oath, saving just exceptions and

errors; and although they are generally accompanied by the craving leave to add, alter, or amend, as they may be advised, the leave craved does not allow them to suggest a falsehood, but simply to enable a party to exercise the power of adding and amending. I feel it my duty to make these remarks, because I shall point out glaring instances that I consider attempts to deceive the Court, with a view of bolstering up accounts utterly false. The states of facts I am about to refer to, not only adopt entries from the books which must have been known to be false, but also (whatever may be the value of the books as evidence) omit in some places true accounts, and in other places insert false items. In the state of facts filed on the 28th of March, 1863, relating to what is called the iron shot account subsequent to the death of Mudoosoodun, we find in the Bengalee year 1260, on the disbursement side, a charge of 1,28,000 Rupees as laid out in the purchase of Co.'s Paper; this transaction would, if true, have converted so much of the estate from cash into Government Securities. On reference to the books, there is found an entry in the *khattah*, or ledger, of 85,000 Rupees as paid for the purchase of Paper as of the 23rd of *Assaur*: in the day book of the same year of the date 26th *Maugh*, we find on the expenditure side a charge of 43,000 Rupees as expended in the purchase of two pieces of Co.'s Paper:—one No. 34982 for 23,000, and another No. 29309 for 20,000. Now this Paper, so far from being purchased on that day, was actually on that day paid off by the Government, so the estate is actually debited with a sum of money in respect of which it ought to be credited. The defendant must have known this fact. But the state of facts does not stop with this false suggestion, but goes on with a most important suppression of the truth, the object of which I think is clear. In that very year only, looking to the books, I find on the 25th *Augrahon*, a purchase of Co.'s Paper for 20,000 in two pieces of 10,000 each. On the 26th of *Augrahon* a purchase of three pieces of 10,000 each. On the 22nd *Maugh*, two pieces of 50,000 each. On the 23rd *Maugh*, one piece for 10,000 Rupees. On the 25th *Maugh*, one piece for 25,000 Rupees. On the 27th *Maugh*, one piece for 30,000, and on the 28th of *Maugh*, one piece for 10,000 Rupees, making a total of Co.'s Paper 1,35,000, entirely omitted from

the state of facts. Again in the year 1264, in the state of facts, we find a disbursement for Co.'s Paper for 3,59,000, and on explanation as to the purchase of a further sum of 20,000, which had been omitted by mistake, and entered as of the year 1268, not one single purchase of Co.'s Paper in the year 1264 is to be found. At the close of the case, in consequence of seeing in the evidence, how the accounts for the state of facts had been made out, I called him, and asked him to point out the several items with respect to the state of facts for 1860. After having given me the amount of the papers set out hereinbefore, I asked him why he did not insert them as purchased in the year 1260. His answer was, that they were not entered in the *khattah*, or ledger. This was true, but the 43,000 improperly placed to debt, was not in the ledger, only in the *jabda*. I further asked him why he had entered in the state of the facts the purchase of Co.'s Paper as of 1264 of 3,95,000, when nothing was purchased: to this he gave no satisfactory reply.

It is unnecessary for me to remark on the evidence given by him before the Master as to the way these states of facts were made out, and although the evidence I am about to refer to, does not relate to the state of facts filed on the 28th March 1863, it being taken before these, it affords sufficient insight into the mode adopted. Bholanauth Doss, when examined on the 7th March 1863, referring to a state of facts before the Master, says: "I have been preparing these accounts under the directions of Baboo Aushootosh Dhur, and whenever there is any *goolmall* or difficulty, I go to his house at night for taking directions. Bissonauth himself comes, but he does not much understand accounts. I understand the accounts I am now making up. I receive the directions of Baboo Aushootosh Dhur, and explain them to the *Mohurrurs*, who make them up under my directions, and when made up, they are shown to Baboo Aushootosh Dhur." Again this witness, when examined by the Court on the 5th August 1864, referring to the state of facts filed on March 28, 1863, says: "I don't know what they wrote in English: no disbursement of 3,59,000 for the year 1264 is in my account. I told Aushootosh Dhur no paper was purchased in 1264. I also showed the mistake;

when it is not in our account I must have told him so. I swear I gave Aushootosh Dhur no such entry as 3,59,000 disbursed in 1264. I told him the 20,000 was purchased in 1260. I did not tell him it was purchased in 1264, but 1260. I am positive as to that."

According to the evidence of the witness, we have the Attorney on the record supplying a state of facts not only untrue in fact, but containing false entries, and which, in my judgment, he must have known to be false, and I must say, whatever latitude may be allowed to the practitioner on behalf of his client, it is certainly requisite that an officer of the Court should not be allowed directly, or indirectly, to put forward any statement that he knows to be false. The suit has been conducted on behalf of the defendant in a way that I must condemn, and the only result of such conduct is the presumption adverse to the defendant, which arises on all points, when the Court has no sufficient evidence before it. As far as I can see, the whole attempts of the defendants have tended to one point, namely, to postpone the final settlement of the account in hopes of tiring out the plaintiff. As to the effect of these untrue states of facts, although the Master has by his finding virtually nullified the false entries and rendered them of no effect, it is not difficult to see the intention at the time they were made, and that they were purposely made with an intention of availing themselves, at a future time, of a further state of facts, enabling them to make charges in respect of a certain large item, which, undoubtedly, was made, and at the time, that is in 1260, and could not have been made according to the accounts appearing in the books, unless the item of expenditure in respect of purchase of Co.'s Paper were brought into the accounts of subsequent years. Thus, an examination of the state of facts filed on 28th March 1863, will show this according to the state of facts of the iron shop for the Bengalee year 1260. A balance, supposed to be a cash balance of 75,48[illegible]-14, is brought down; this with the receipts will make a total of 3,54,923-13-3 as receipts from all sources for that year. On the other side, the disbursements for trade show a sum of 38,056-6-9 as disbursed for that year, and 1,28,000 as spent in Co.'s Paper, showing an apparent balance of 1,88,867-4-6 to

be carried on to the next year 1261. The list of Co.'s Paper made out by Bissonauth and marked C. was filed, and this being before the Court, and the possession of so much Paper being admitted, it became necessary, in order to let in the claim of 1,25,000 spent for the Temples, to falsify the date of purchase of paper, otherwise had they filed true accounts, it would have been seen at once that they could not, without a sale or pledge of the Co.'s Papers, have had money to make the disbursements attempted to be claimed in the state of facts filed afterwards on the 24th November 1863. In that state of facts it is found that they claim, as spent at Bealah for the year 1260, no less a sum than 1,25,000 on the Temples, and 21,828 as for that year's maintainance, and sums amounting to 18,512 for three years previous to 1260, making a total of Rs. 2,03,396 as expended by them exclusive of the purchase of Co.'s Paper, but the Co.'s Paper they really did purchase in that year amounted to Rs. 2,20,700, so that if they had really spent the money for the erection of the Temples, and the maintenance out of the monies appearing to credit of concern, and had also purchased the paper, they would have spent 4,24,996 out of 3,54,923, or in other words, 69,173 more than they had. The necessity of falsifying the real state of affairs in the state of facts, is apparent. Following the same principles for the years 1261 1262, we shall have no less a sum of excess expenditure over receipts at the end of 1262 than Rs. 1,34,545. This state of things arises on the accounts and items appearing in the state of facts filed by defendants on 28th March, 25th June, and 24th of November 1863, when the real purchases of Co.'s Papers are traced. It is found that the above states of facts make the accounts rendered in them impossible. Nor do the books of account render the states of facts possible; the books contain no entries of the expenditure for Temples; they are silent on the subject. As to the value of the books affording any insight into the accounts, I shall comment hereafter; but with regard to the states of facts, I can say no more than that they are mere delusion, and, as far as I can see, put forward on the supposition that, as the Master had held that the burthen of disproving the state of facts was thrown on the plaintiff, they might possibly pass without comment. It is clear to me that the intention in making up the state

of facts in the above manner was to enable them at a future date, to bring in the expenditure of the 1,25,000 for the Temples, which were really built about 1260, and also to hide an expenditure incurred in the building of those Temples, and in the purchase of Co.'s Paper, which would have been impossible as of that year, according to the accounts filed. I therefore come to the conclusion, that the accounts set out by the defendants in the state of facts, do not show the real state of things, and that the defendants had, in the back ground, monies which they did not carry into these accounts to the credit of the family. There can be no doubt that they spent a very large sum of money in the Temples, and it is beyond dispute now, that they made nearly all of the heavy purchases of Co.'s Paper entered in the state of facts as of 1264, in the year 1260. The aggregate of these purchases and the expenditure for the temples would largely have exceeded the amounts represented as balances, and would, in fact, have been impossible, unless there had been a fund in the back ground. The defendants now try to treat balances not as actual cash balances, but as figure balances, subject to the deductions they claimed in the several states of facts filed on the 23rd and 24th November in respect of items they say they paid, but in respect of which no entries are to be found in any of the books. Admitting for the sake of argument this to be true, its application entirely fails when we come to a year like 1260, when expenditure actually proved, shows that such expenditure must have swallowed up every item of balance remaining to credit. They have to pay cash for Co.'s Paper actually purchased, and also for the Temples, and as they do not show loans for the purposes on deposit of Co.'s Paper or otherwise, one can only come to the conclusion that as the facts of expenditure are beyond all doubt, the accounts as rendered, and as shown by the books, are impossible, and made to fit an imaginary state of facts. The books have not been balanced as of any year, and when I see the way in which entries are made as to contingent expenses in saltpetre accounts, involving heavy sums utterly unaccounted for, and quite beyond the usual routine of trade, they may, notwithstanding the allegation of expenditure in bribing, have carried in their books a very large imaginary expenditure to hide

monies credited, and of which abundance of proof might have been obtained. With regard to the books as evidence, even *primâ facie*, as far as I can see, they are in no way whatever properly kept. As they were not translated, the Court had not the means of knowing whether in the mode of keeping them generally, they were correct or not; consequently I referred them under Act 8 of 1859 to Baboo Kadarnauth Bhose, who has been for many years attached to the Master's Office. He has made his report, and that will speak for itself. During the argument, however, Counsel pointed out several instances, from which it was impossible to come to the conclusion that the entries in the account had been made contemporaneously with the transactions referred to; for instance, with regard to the 1,42,500, the money received from the Government gun-powder works as the price for saltpetre, the sale of saltpetre and the price is made to appear in the *Jubda* as if made on that day, when, in fact, the order for payment for the saltpetre was made some six or seven days previously, and in respect of saltpetre, the delivery of which was going on from day to day for some time. Again on the same day, the 25th of *Assaur*, an entry in the *Jabda* relating to the purchase of Co.'s Paper sets out the numbers of the papers delivered, whereas, on the evidence, the papers themselves had no existence for some days afterwards. Again the entry of a purchase of Co.'s Paper for 43,000 Rupees on the 26th of *Maugh* 1260, when the fact was, paper to that amount was sold, shows that the books were not properly kept, and leads me to the conclusion that they were fabricated for the purposes of the suit. Again, the books do not contain accurate entries as to the receipt of interest on Co.'s Papers, which they actually received. In this item alone they have debited themselves short with very large sums, during the time when it was a mere matter of calculation, as to what the interest was on the 8,15,000, admitted as being in Company's Paper. Again, the large expenditure of 125,000 for the Temples, the payment of 67,000 to the Attorneys, which, no doubt, was made, of which there is no entry in any of the books, lead me to the conclusion that it is impossible to say that the books are correctly made. Bissonauth, in his evidence, states, that the entries in the *Jabda* were made day by day as they

occurred ; that is the ordinary practice, but if so, it is impossible that the *Jabdas* put forward are the real ones. The books for some reason or another were not brought in until September 1863 ; and, although it is alleged, they were kept in the Attorney's Office all the time, I am by no means satisfied that they never left the Office.

On the subject of the books actually produced, I must observe that in the schedule to the answer they set out distinctly what books they have, and what books are in a delapidated state and destroyed by white ants. Now, although in the answer they state they have the *kucha Jabda* books from 1243 to 1249 inclusive ; in their state of facts they give no accounts for any of those years. The books for the year of Mudoosoodun's death, and a year previously thereto, seemed to be in a tolerable state of preservation, but none are forthcoming for the two or three years previous to the death. Now, I must observe, that the two or three years previous to the death of Mudoosoodun are of all importance to the plaintiff's case, as the extent of her right to after accretions, must be regulated by the extent of her right at the time of Mudoosoodun's death. Now all written evidence of accounts is wanting as to that particular epoch ; large quantities of Co.'s Paper must have been purchased about that time, but of this, there is nowhere any evidence forthcoming. At the time of filing their answer, it is quite clear that they had full particulars of the estate, as they tie themselves by oath, not only to an amount of Co.'s Paper, but also as to the dates, numbers, &c., identifying the very paper. Now at the time, the answer was put in, they could not have had the large portion of the paper with them so as to obtain those particulars from the face of the papers themselves, as the greater portion of it had been either paid off by Government, or converted into Paper of the 4 per cent. loan; when, however, they come before the Master, the surviving defendants can give no account whatever as to the Company's Paper, and all they can say is, they know what was purchased since, and the method is adopted of treating all that does not appear in the books as having been purchased since, as having been purchased prior to Mudoosoodun's death. No doubt the books prior to Mudoosoodun's

death showed really what was purchased, and as they had, at time of answer fixed themselves to eighty-one pieces as then existing, and of the value of 8,15,000, it was evidently their object to make Mudoosoodun's estate as small as possible, and so to give his widow as small as possible a share of the accretions. I can therefore come to no other conclusion than that the books for those years have been improperly made away with. I am by no means satisfied with the mode of custody of the books in the Solicitor's Office previously to their being brought into the Master's Office. The Master seems to think there was ample opportunity during such custody for the defendants to do as they liked with the books, and my experience in this country has led me to the conclusion, that the destruction of documents by white ants is not always purely accident, and the results of years laying by. Nothing is easier than to preserve documents, if their preservation is essential, or to get them destroyed, if their destruction is desired; put the documents in a damp room on the floor near a wall, and in two months but few traces of the documents will be found. I am not satisfied either with the genuineness of the entries in the accounts, nor yet with the mode in which they have been kept, and although evidence might have been given as to the transactions recorded, especially those of the last few years, none whatever has been given. Bissonauth Chunder for several years seems to have taken an active part in the business, but still when examined, he could speak to points asked by his Counsel, but whenever the opposite side, or the Court asked him for explanation, he was always silent and referred the Court to the *mohurrirs* who wrote the accounts. I hold that the books were not *primâ facie* evidence of their contents as against the plaintiff since the death of her husband, but even had the Court given special direction under Act VI. of 1854, it would be impossible, having regard to the mode in which they have been kept, and the evidently false entries hereinbefore referred to, to treat them as evidence.

With regard to the evidence given in support of the books, it is absolutely worthless. The only surviving defendant, Bissonauth Chunder, who ought to have been able, and who, in my opinion could

have given valuable evidence, professed ignorance of everything, although he showed in one or two instances a very keen appreciation of the hearing of questions; for instance on a former day his Counsel in argument maintained that the 1,25,000 Rupees expended in building the Temples, should be charged to the estate generally, as it was expended under the directions in the father's will, upon which the Court intimated that if so, it must come out of the father's estate, and not out of the accretions generally, and would not be charged against the plaintiff's share. On the following day, the Court asked Bissonauth whether they had built the Temples in pursuance of the instructions in their father's will. This he altogether repudiated most positively, until his deposition in the former suit was read to him, in which he most distinctly swore when he was trying to set up his father's will, that acting under the instructions therein contained, they had built the Temple as soon as ever they could get the Land suitable for the purpose. It is needless to recount more instances. The above are my views generally as to the value of the books as evidence, and also of the evidence in support of the books. I shall now give, where I think it necessary, my reasons for my decision. With regard to 85,000 Rupees, representing the four pieces of paper numbered 13,213 to 13,216 inclusive, I have no doubt whatever that the papers were purchased by the loan acknowledgment, dated *Assaur* 23rd 1260, or 6th July 1853, and I do not think there is any doubt, but that the monies, with which they were purchased, formed a portion of the 1,43,000 received from the Treasury on that day. Did the case, as to those papers for the Rupees 85,000, depend alone upon the fact, as to those identical papers coming into the possession of the defendants after the death of Mudoosoodun, I should have no doubt upon the point, but this important question arises:—What was done with the Co.'s Papers and cash admitted to be in the defendants' hands at the time of Mudoosoodun's death? *non constat*, that there was not even more Co.'s Paper in their possession than admitted in their answer, and *non constat* that a considerable portion of the Papers actually purchased in the English year 1853-54, that is the Bengalee year 1260, and debited in the books of the Bengalee year

1260, was not purchased out of the proceeds of Papers belonging to the estate at the time of Mudoo's death. The Bengalee year 1260 was the time when the Government of India converted the then existing 5 per cent. loan into a 4 per cent. loan, paying off at par those who delivered to take possession in the 4 per cent. loan, and it strikes me as probable that the very large purchases of paper of that year, although debited in the books as new purchases, were bought by monies arising from the sale, or conversion, of some of the Paper belonging to the estate at the time of the death of Mudoo-soodun. There are some suspicious circumstances appearing on the face of the books of that year, and they lead me to a strong suspicion that, at the time the books were brought in, some tampering was going on to make the books fit the state of facts. In the first place there is only one entry to be found in the *Khottian* or ledger, as to the purchase of Co.'s Paper, and that is of the Paper purchased with the Rs. 85,000, and it will be observed, that when the Court asked the witness Bholanauth Doss, as to how he only inserted in the account he made for the state of facts, the items for the purchase of Paper for the 43,000 and the 85,000, his answer was "I did not find them in the *Khottian*;" in the *Khottian*, however there was only one entry of Co.'s Paper, namely, that of the Rs. 85,000, and as far as the Court could see, there was no *Khottian* entry of any Co.'s Paper whatever, except that one, for any of the years. The *Jabdas*, however, contain entries of purchase of Paper for upwards of two lakhs of Rupees, independently of the fictitious entry as to purchase of Co.'s Paper for 43,000, which was, in fact, a sale or equivalent to it, as the Government paid off that amount. I cannot account for that single *Khottian* entry in the books, or the fictitious entry of the purchase of the 43,000 Rupees Paper, coupled with the fictitious state of facts filed on the 28th day of March 1863, making the purchase of the Paper as of the year 1264, when not a penny was spent in the purchase of Co.'s Paper, except on the supposition that the accounts and the account books were cooked, to make a case out favorable for the defendants, and although I am of opinion that the defendants show by independent evidence the fact of the purchase of the four pieces of Paper for 85,000 Rupees, and have given evidence

to lead me to the conclusion that the identical Papers were purchased out of the 1,43,000 received from the Treasury on account of saltpetre, still they no way show what became of 3,88,000 Rupees admitted to be in possession at the death of Mudoosoodun, or of the cash in silver and notes, which amounting to 75,000 Rupees are admitted in their answer to be in their possession at the time of Mudoosoodun's death, but start with a cash balance of account for Rupees 29,863-15-9 as per state of facts filed by them on 11th September 1863, which, in face of the admission made by the answer, is allowed by the Master as the cash balance at the death of Mudoosoodun. If, therefore, I were to allow the defendants the benefit of the Co.'s Paper to the extent of Rs. 85,000 to be deducted from the estate as existing at to the time of the death of Mudoosoodun, I should allow the defendants, who have never given any account of what the Paper really was, save by their answer, to reduce the estate as admitted in their answer, as Co.'s Paper from 3,83,000 and cash 75,000, including a total 4,63,000, to 4,37,000 less 85,000, or 3,52,000 Co.'s Paper, and cash balance 29,863, making a total of Rs. 3,81,363. In the absence, therefore, of all evidence showing really what was the Co.'s Paper existing at the time of the death of Mudoosoodun, and with the fact of the admission in the answer as to the amount of Co.'s Paper and cash, the only way in which I feel justified in treating the case is to take the amount of Co.'s Paper and cash as admitted by their answer, as the amount of the estate in Co.'s Paper and cash at the time of the death of Mudoosoodun, as I have remarked, in another portion of my judgment, the defendants at the time of putting in their answer, had not the material from which they gave their answer on oath : however, when they come to account before the Master, they bring forward a state of facts not fortified by any oath with regard to all the states of facts filed. Since the 24th February 1863, there has been no verification of a fact on oath. The Master has taken the accounts as true, save and except where the incorrectness has been discovered by the plaintiff. In fact, the accounts of the estate since the death of Mudoosoodun have not been supported by oath. With regard to my reasons as to the disallowing the heavy contingent charges for saltpetre, I have shown in my judgment my reason sufficiently.

As to the 1,25,000 expended in the building of the Temples, as the Temples were certainly built, and as not one item of the expenditure is charged in the books, it is clear that the expenditure must have been made out of monies which have never been brought to the credit of the joint family. However, as the erection of the Temples was distinctly ordered in the will of Ramtonoo, I assume it has been made out of his estate, and think it ought to be deducted therefrom; the effect of this will be to make the joint estate larger by the sum of 1,25,000 at the time of making the decree. There is only one more point on which I have a few remarks to make. I have before observed, that, although the Master has throughout treated the balances in the schedule to his account as cash balances, no exception was made to this, and I note, that in the state of facts filed on the 28th of March 1863, containing the fresh account commencing 1255 B. Y., and lasting with a cash balance, the language used in the subsequent year is simply balance. There has been an object in this, and the intention I take it was to treat this simply as a figure balance, liable to be reduced by carrying to debit, items covering a number of years, and which nowhere appear in the account books. These items intended to be charged were the erection of the Temples, the cost of maintenance, and the Attorneys Bills. Bissonauth, during the time he was under examination, and whilst I was making some comment on the subject of the cash balances, volunteered a statement that the only real cash balance was that of the first year 1255. What he means by this, I cannot say: the defendants have altogether ceased purchasing Company's Paper, and no account is given as to what is done with the balances. The only conclusion is, that the books referred to are not the real books. It is impossible to believe that sums amounting to 1,25,000 for the building the Temple, and Rupees 67,000 for the payment of Attorneys, cannot have been taken from the joint funds, and not a trace of their expenditure to be found in the books. In the absence of all proof, as there is no doubt of the fact of payment, I must presume that they had funds other than those accounted for. I must, in conclusion, remark, that the whole of the proceedings before me have been most unsatisfactory. To me it has appeared that the defen-

dants have purposely kept back every thing from the Court, in order that they might, in the confusion, get a better chance of appealing with success. The Counsel for the defendants has displayed great perseverance and ability in his conduct of the suit, and this he has done with very little assistance from his instructors.

CHITTO SHEIK AND OTHERS, (Defendants) Appellants.

versus.

KAZEE MUZZUR HOSSAIN, (Plaintiff) Respondent.

A. having brought an action against B, was allowed to withdraw with leave to bring a fresh suit, and was also ordered to pay the costs. Held, that the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings on the ground that the costs had not been paid.

Held further, that the Court of Appeal had no power to entertain the question, as the order was in the nature of an interlocutory one, and therefore not within its jurisdiction.

In an action brought to recover possession of certain land in Calcutta under the new Procedure Code, and heard before Mr. Justice Wells, the Counsel for the plaintiff after opening the case and calling several witnesses, found that he would be unable satisfactorily to establish a certain pedigree upon which his title to the land rested, and applied to His Lordship to be allowed to withdraw the suit with leave to bring another under Section 97 of Act VIII. of 1859. Liberty was granted, and the plaintiff was ordered to pay the defendant his costs. The order, however, did not in terms make the payment of costs a condition precedent to the liberty to bring a fresh suit.

The plaintiff, pursuant to the leave granted, instituted another suit in respect of the same property against the same defendants in the former suit, joining other parties as defendants with them, but the plaintiff did not, before doing so, pay the costs of the former action.

On the 7th of July last, an application was made to Mr. Justice Macpherson, for an order to stay the proceedings in the suit, until the costs of the previous ejectment suit were paid by the plaintiff to the defendant.

Graham, for the defendant, contended that the plaintiff ought to be restrained from bringing a fresh suit against the defendant for the same cause of action, until the costs in the former suit were paid. The Rule of Practice under the old system was clear enough, and there was no reason why being based as it was on equity and good reason, it should not apply now. July 7, 1864.

Woodroffe, for the plaintiff, maintained that the Rules of Practice under the old system had no application now. The case must be governed by Act VIII, which made no provision of the kind.

Macpherson, J., said, he was of opinion that the old Rules of Practice had no application in this case. The question was entirely ruled by Section 97, of Act VIII. of 1859, which enacted that "if the plaintiff at any time before final judgment satisfy the Court, that there are sufficient grounds for permitting him to withdraw from the suit, with liberty to bring a fresh suit for the same matter, it shall be competent to the Court to grant such, permission, on such terms as to costs, or otherwise, as it may deem proper. The proper course for the applicant was to have applied to the Court granting leave to withdraw at the time, to make the costs of that suit a condition precedent to the bringing of the second suit, inasmuch as the Section of the Procedure Code vests absolute discretion as to the costs, or otherwise, in the Court or Judge granting such permission to withdraw. This, however, had not been done. The order which had been

made in the former suit was, that the plaintiff should be allowed to withdraw, and that he should also pay the costs. He thought that under the circumstances it was not in the power of the Court to stay proceedings. The application must be dismissed with costs.

The application was accordingly dismissed, and the defendant now appealed against the order.

The Advocate-General contended, that the defendant, was entitled to the costs of the previous ejectment in which the proceedings had been withdrawn, and that the plaintiff ought not to be allowed to proceed with the present suit until such costs were satisfied; and he cited several cases decided in the English Courts, in which proceedings in a second ejectment had been stayed, until the costs of a previous ejectment were paid. Sept. 7, 1864.

Woodroffe objected that the refusal of Mr. Justice Macpherson to order a stay was not a "judgment or decree," and could not, therefore, form the subject of an appeal, the Civil Procedure Act Section II of the Charter allowing an appeal in respect of a "judgment or decree only."

The Advocate-General for the defendant contended, that the words of the Code ought not to be restricted to a final judgment disposing of a suit; but that it comprehended a decision in a matter relating to a suit: and he also contended that the order related to the execution of a decree, with reference to which an appeal is given by Section II of Act XXIII of 1861.

Norman, C. J., I am of opinion, that the Court has no jurisdiction to entertain the appeal. The application to Mr. Justice Macpherson was an interlocutory application, and his refusal to grant the order was final. The case does not fall within the Section, giving an appeal from orders relating to the execution of a decree. The appeal must be dismissed.

Levinge, J., concurred.

Appeal dismissed accordingly.

IN THE MATTER OF MUDDOOSOODUN DOSS, *a Prisoner in the Great Jail of Calcutta.*

A decree of the late Supreme Court must be treated as a decree of the High Court, and as subject to the provisions of Act VIII., except so far as the application of any provision of Act VIII., would deprive a party of any right, or privilege, under the old Procedure.

In this case the prisoner had been arrested under a *ca. sa.* issued in execution of a Judgment of the late Supreme Court, and had been detained in Jail for more than two years. He had attempted to take the benefit of the Insolvent Act, but his petition had been dismissed on the ground of fraudulent conduct. Sept. 28, 1844.

Newmarch now moved for the discharge of the prisoner under Sec. 278, Act. VIII; which enacts that "No person should be imprisoned on account of a decree for a longer period than two years."

Eglinton for the judgment creditor maintained, that Sec. 278 Act VIII applied to decrees of the High Court, and not to decrees of the late Supreme Court. To discharge the prisoner, moreover, would be to act in opposition to the Insolvent Court, which had adjudicated upon the prisoner's case, and denied him any relief.

Phear, J. said, the real question in this case was whether the decree, on account of which the prisoner was in custody, being a decree of the late Supreme Court, might be considered a decree of the High Court, within the meaning of Sec. 278. He thought upon consideration of Sec. 12 of the Charter, that a decree of the late Supreme Court must be treated as a decree of the High Court, and as subject to the provisions of Act VIII., except so far as the application of any provision of Act VIII. would deprive a party of any right or privilege under the old procedure. The application of Sec. 178 in this case would not be the taking away but conferring a privilege. Even under the present clauses of the Insolvent Act the prisoner could not be detained for more than two years. The prisoner was entitled to his discharge.

Order accordingly.

DAMODUR DOSS *vs.* CHOONEE BEBEE.

Where good cause is shown for non-appearance, the Court, under Act VIII, may restore to the board a suit dismissed for default.

When this case was called on the defendant was present, but neither the plaintiff nor his Attorney were in attendance, and the suit was accordingly, dismissed. Nov. 23, 1864.

Newmarch, for the plaintiff, applied to have the case restored. The absence of the parties had been owing to an understanding which had been come to between the parties for an adjournment on account of the illness of a material witness, and an affidavit was produced to that effect.

Phear, J., said, that under Act VIII, the Court had no power to restore the case to the board unless good cause be shewn to the Court why the plaintiff had failed to appear. In this instance, however, he thought that the conditions prescribed by Sec. 119 of the Act, had been fulfilled. The affidavit produced by Mr. Newmarch was satisfactory, and the defendant, it appeared, consented to the application. The cause might, under the circumstances, be restored.

Case restored accordingly.

The Peninsular and Oriental Steam Navigation Company *vs.* Konnoylall Dutt.

Held by the Court of first instance and confirmed on appeal that a covenant in a lease for years to grant a new lease on the expiration of the existing term, under and subject to all covenants as in the first lease contained, is satisfied, if such new lease contain the like covenants as the former lease except the covenant for renewal.

The *Advocate General* with *Newmarch* for the Plaintiffs.

Graham with *Woodroffe* for the Defendants.

March 4th, 1864.

This was a suit for specific performance of a covenant for renewal. The covenant was contained in a lease made between the defendant Konnoylall Dutt, of the one part, and Thomas Harold Tronson, therein described, as agent of the plaintiffs the Peninsular and Oriental Steam Navigation Company, for and on the behalf of the said Company, of the other part, by which the defendant granted a lease to the said Thomas Harold Tronson, as such agent, of the house and premises therein described, for a term of five years, at a monthly rent of 400 Rupees, under and subject, among other covenants, which do not affect the present question, to the following covenant:—

"And further, that if he, the said Tronson, as such agent as aforesaid, or his successors, shall be desirous of taking a new lease of five years of the premises, after expiration of the said term of five years, and shall, by notice in writing, signify such his desire to the said Konnoylall Dutt, his heirs, &c., he, the said Konnoylall Dutt, &c., shall and will immediately before the expiration of the term of five years, grant and execute to Tronson, or his successors, a new lease of the Premises, to commence from and after the expiration of the present term, for the further term of five years, at the same monthly rent,

payable in like manner, and under and subject, in all respects, to the like covenants, provisos, conditions and agreements, as are herein contained, including the present covenant for renewal, but subject to such further provisos as might be then eventually agreed on."

The question between the parties was, whether the lessor would sufficiently perform that covenant, by giving a lease for five years, with a covenant to renew for a further period of five years, or whether he was bound to add to that covenant a proviso, that the lease to be granted in pursuance of such covenant, should contain a covenant for further renewal.

Norman C. J.—The cases seem to come to this, that a covenant in a lease to grant a new lease at the expiration of the existing term, under and subject to all covenants, as in the first lease contained, is satisfied, if such new lease contain the like covenants as the former lease, except the covenant for renewal. These cases are intelligible on this simple ground. If a man stipulates for a new lease, that means one lease, and not a succession of leases, and therefore the construction, that the covenant for a new lease contained in the former lease, must be excluded from the new lease, merely carries into effect the apparent intention of the parties and avoids a repugnancy. That appears to me a common sense view of the well known rule of law on this subject, as established in a class of cases, of which *Iggulden* vs. *May*, 9 Vesey, J. 325, and 7 East, 237, is an example.

In the case of *Hare* vs. *Burges*, 4. Kay, and John, 45. which was pressed upon me by the learned Advocate General, the lease was for lives, with a covenant on the death of either of the *cestuis que vie*, to execute a renewed lease at the same rent and subject to the same covenants, " including this present covenant." The words " including this present covenant" could not be satisfied wihout the insertion of the whole of the covenant, and I am not surprised that Vice Chancellor Page Wood required the insertion of the whole of that covenant, word for word, in the new lease.

The present case is distinguishable from *Hare* vs. *Burges.* Here the covenant is to execute a renewed lease "for and during the term of five years, at the same monthly rent, payable in like manner, and under and subject in all respects to the like covenants, provisos, conditions and agreements, as are herein contained, including this present covenant for renewal, but subject to such further provisos as might be then eventually agreed on." It must therefore contain the covenant for *renewal*, that is, a covenant for the execution of a further lease for five years, at the monthly rent, and subject to the like covenants, provisos, conditions and agreements, as are contained in the present lease. But so far from its being said, that this covenant for renewal, shall contain a proviso, that the lease to be granted in pursuance and performance of such second covenant for renewal, shall contain a covenant for further renewal, the covenant is to be "subject to such *further* provisos as shall be then eventually agreed on." Looking then at the language of the covenant and applying the principles on which these covenants for renewal have been construed, I think that the covenant for renewal will be satisfied by the grant of a lease for five years, with a covenant for a renewal for one further period of five years, though such covenant does not contain a stipulation, that the third lease shall contain a covenant for further renewal.

The form of the proviso, for the increase of the rent, appears to me to shew that the parties have made no provision for any increase of rent exceeding 100 Rupees per month above the present rent, though it is clear that the rent is intended to be a rack rent, and that confirms me in the opinion I have formed, that to construe the covenant as a covenant for perpetual renewal, would be to put an interpretation upon it, which is not in accordance with the true intent of the contracting parties. The lease which the defendant is willing to execute is, therefore, substantially a lease, such as he has bound himself to grant. The suit must be dismissed with No. 2 costs.

Suit dismissed accordingly.

PENINSULAR AND ORIENTAL COMPANY *vs.* KUNNOYLALL DUTT.

Appeal.

In this case the Plaintiff appealed from the decision of the Court of first instance and the question was reargued before Mr. Justice Morgan and Mr. Justice Peterson.

May 23rd, 1864.

Morgan J.—This is an appeal from a decree made by the Chief Justice dismissing the plaintiff's (appellant's) suit for specific performance. The agent of the plaintiffs had taken, on their behalf, a lease from the defendant of a house and land at Garden Reach for the term of five years. The lease contained a covenant for renewal; and shortly before the lease expired, the defendant was required to grant a renewed lease under this covenant. The parties having failed to agree upon the terms of the new lease, the plaintiffs instituted this suit to obtain specific performance of the covenant to renew; and the matter chiefly argued in the Court below and here was the proper construction of the covenant, which is in the following words, "The said Kunnoylall Dutt for himself, his heirs, executors, and administrators and representatives, doth hereby covenant, promise, and agree to and with the said Thomas Harold Tronson as such agent as aforesaid, his successors and assigns * * * * * * that, if the said Thomas Harold Tronson as such agent as aforesaid, or his successors, shall be desirous of taking a new lease of five years hereby granted, and shall by notice in writing signify such his desire to the said Kunnoylall Dutt, his heirs, executors, administrators, representatives and assigns, the said Kunnoylall Dutt, his heirs, executors, administrators representatives or assigns shall and will immediately before the expiration of the said term of five years, grant and execute unto the said Thomas Harold Tronson, or his successors, a new lease of all and singular the premises hereinbefore demised with the appurtenances, to commence from and after the expiration of the present term hereby granted, for and during the further term of five years, at the same monthly rent payable in like manner and under and subject in all respects to the like covenants, provisoes, conditions and agreements as are hereinbefore contained, including

this present covenant for renewal, but subject to such further provisoes as may be then eventually agreed upon."

The Plaintiffs contend that they are entitled to a new lease for five years, which shall contain (with other covenants) a covenant for renewal in the same words as those above quoted. The Defendant contends,— and the Court below has decided, that he is bound only to grant a new lease with a covenant for a single further renewal, and that the plaintiffs are not entitled to a repetition of renewals beyond this.

It is not disputed that if the words of the covenant clearly import a right of repeated or perpetual renewal, the appellants are entitled to specific performance in the mode claimed by them, nor is it denied that if the language used is ambiguous or uncertain, it should not be construed to give so extensive a right. The Advocate General for the appellants argued that the covenant gave a right of perpetual renewal, and that the words "but subject to such further provisoes as may be then eventually agreed upon" at the end of the covenant, were inoperative, expressing only what without them would be understood. If we were called upon to say what was the true construction of the covenant, those words being rejected, I should have great difficulty notwithstanding the high authority which was cited (the decision of the Vice Chancellor Page Wood in *Hare* vs. *Burgess,)* in coming to the conclusion that it expressed an intention of perpetual renewal. *Hare* vs. *Burgess* 4 Kay and John 45 was the case of a renewable lease for lives, and some of the grounds there relied upon, are not applicable to the construction of the present covenant, which is in a lease for years. The practice of conveyancers, which was also in that case taken into consideration, although not wholly to be disregarded here, would not of itself be a satisfactory ground of decision in the present case in which we have to construe an instrument not very accurately framed. It is, however, I think unnecessary that we should decide what is the proper construction of the covenant, if the last clause be rejected; for it is clear that we must ascertain the meaning of this covenant by looking not only to the words thereof, but to the context; and that in the construction

of the covenant, effect must, if possible, be given to all the words of the instrument.

The lease is at a rack rent: no fine or premium is payable on renewal, but it is provided that within certain limits the rent may be increased, if an increase takes place in the rents of the neighbouring property. There are covenants for repairs, and for yielding up the premises in good repair, and a covenant not to assign. The covenant for renewal gives an option to the lessee exclusively to renew. The appellants cannot be compelled to accept a renewal, though the lessor binds himself to renew for a rent, it would appear no larger than might be obtained from an ordinary tenant; and it is clear from another provision of the lease that the agent of the appellants (an English trading Company having only a branch establishment here) reserves to himself full and some what vague powers to determine the lease on giving three months notice. The covenants for title by the lessor extend only to the first lease of 5 years.

The covenant for renewal, if read alone, expresses the following intention—that there shall be a new lease—that the new lease shall contain covenants (including a covenant for renewal), *not* as the appellants contend in the same words as the former covenants (*nullum simile est idem*) and that the covenants in the new lease—shall be subject to such further provisions as the parties may eventually agree upon when the time of the first renewal arrives. The covenants in the new lease may, therefore, if the parties then agree, be made subject to further provisions qualifying, restraining, or otherwise altering them.

Expounding this covenant with a due regard to the other provisions of the lease, none of which contemplate an interest of an enduring nature, I do not think it can be construed to create an obligation to renew perpetually, or to grant a new lease with a covenant for renewal in the precise terms of the covenant in the first lease, in the event (which has happened) of the parties being unable to agree respecting the further provisoes. It is improbable that a permanent interest such as is created by a cove-

nant for perpetual renewal could have been in the contemplation of either party.

When the first lease was about to expire, the plaintiff's agent applied for a renewal; and after various proposals on both sides, to which I shall not particularly refer, the negociations broke off; the parties being at variance respecting, not only the terms of the covenant for renewal, but certain other provisions of the new lease. It is in this state of matters that the plaintiffs sue for specific performance. In my opinion the proper construction of the covenant is not to give the plaintiffs a right of renewal in the terms asked for. It is at least uncertain whether the covenant admits of the construction put on it by the plaintiffs, and the defendant in his written statement says that his intention was only to grant a single renewal. Under these circumstances, I think, there should be no decree for specific performance in the terms prayed for.

Peterson J.—The right of the plaintiff, or their agent to a renewed lease is recognized by the judgment of the Court below, and is assumed by the form of the issues, which were framed in an early stage of the suit. Those issues were not noticed in the argument before us, and were, I presume, abandoned at the original hearing. If, as I understand, the company insist on a specific performance of a renewed lease in the terms prayed for by the plaint, I think that they are not entitled to such a decree, and that their suit was properly dismissed.

It is unnecessary to go at length through all the proceedings that have taken place, further than to notice the prayer of the original plaint which is as follows:—The plaintiff prays that the defendant may be decreed specifically to perform his convenant for renewal contained in the lease of the 19th June 1858, and to grant a new lease for the term of five years commencing from the expiration of the term of five years, granted by the lease of 19th June 1858, to the plaintiffs, or John Paterson, at such increased rent as the Court shall think proper &c. such lease to contain a covenant that if the said John Paterson as such agent or assistant, or his successor, or the other the Lessee shall be desirous of taking a new

lease of five years of the said demised premises, after the expiration of the term of five years to be granted by the lease now sought to be obtained, and shall by notice in writing signify such his desire to the defendant, his, &c. the said defendant shall at the expiration of the said term of five years now to be granted, grant to Paterson or his successors a new lease, &c., for the further term of five years containing all the covenants, &c., including the covenant for renewal therein contained. The plaintiffs, in fact, seek a right to have a lease that would amount to a renewal in perpetuity should they be desirous of renewing from time to time. In the original lease of June 19th 1858, after the covenant for renewal are these words,—"but subject to such further provisoes as may be then eventually agreed upon." I must here observe that, in the prayer for relief, although the Court is asked to grant a renewal at such increased rent as the Court may think fit, the Court is not asked to grant a new lease subject to such further provisoes as it may think fit and proper. The plaintiff, in fact, ignores the existence of any further stipulations. In the written statement put in by either party, it appears, that considerable discussion took place as to the terms on which a renewal was to take place, and the plaintiffs were willing to take a lease of twenty years at a fixed rent independently of the question of renewal. This fell to the ground in consequence of the defendants insisting upon the expunging of the clause enabling the plaintiffs to give up the lease on three months notice, and also in making the lessees pay certain taxes. A very long correspondence ensued, and as the parties could not agree, the plaintiff set up his claim for a perpetual renewal of the original lease as it stood. The defendant offered one, with a power of renewal for another term of five years, in fact, a lease which might at the option of the lessees be one for ten years. As the parties could not agree, the Court has now to decide on the construction of the instrument under which the plaintiff asks for a specific performance.

It is argued that the case of *Hare* vs. *Burgess*, 4 Kay and Johnson, p. 45, must control our decision in the present case. In that case the covenant ran as follows :—"That in case the plaintiff, upon the death of either of the three original lives, shall be desirous of taking a new

lease for another life, and shall within twelve months after such decease give the requisite notice, and shall nominate any person in the room of the deceased, the person entitled to the reversion shall execute a new and further lease for the life of the person so to be nominated, and the lives of such of the three first named persons as shall then be living, and of the survivor and survivors of them at the same rent, and with the same covenants including *this present covenant*, and also that if within the twelve months after the decease of any one of the three original *cestui qui vies*, and before any renewed lease shall have been granted by virtue of the former covenant, any other or others of the three shall die, it shall be lawful for the plaintiff, his heirs or assigns to insert another life or lives in the lease so to be granted as aforesaid in the room of the life or lives which shall so drop, upon making certain payments, it being the intention of the parties that the plaintiff shall not be obliged, provided he renew within the period appointed, to incur the expense of a further or additional lease or leases in respect of the second and third lives so dropping." In that case, it is to be observed, that if the contention of the defendants that it was to be construed as a covenant to renew only so long as one of the original *cestui qui vies* survived, were upheld, it would have been necessary to have expunged the latter covenant which contemplated a lease with three fresh lives, after the death of the original *cestui qui vies*, and I do not think but for that further covenant that the decision of the Vice Chancellor Page Wood would have been in favour of a perpetual renewal. In the case of *Furnival vs. Crew*, 3 Atkins 83, where there was a lease for 3 lives and a covenant by Lessee to pay within 12 months after the death of any of the lives a fine for every life added from time to time, and the Lessor covenanted that he would for the consideration of a certain sum to be paid to him, his heirs, &c. in the name of a fine for adding one life to the remaining lives aforementioned, execute one or more Leases under the same rents, and so continue the renewing of such lease or leases to the Lessee, paying as aforesaid so much for every Life so renewed from time to time, Lord Chancellor Hardwick held that the Plaintift was entitled to have the like covenant inserted upon every renew-

al, as well upon the death of the new lives, as upon the death of the old. The words "so to continue renewing such lease or leases" not meaning barely continuing a new life, but continuing and filling up the estate from time to time, and that the words "for every Life so added as aforesaid" meant any of the lives in the future leases; as in the case of *Hare* vs. *Burgess* there was a clear expression of intention that the Lease was to operate by renewal beyond the existence of the original lives. But were it necessary in the present case to decide that the words used in the present Lease "irrespective of the further proviso as to stipulations, &c. to be agreed on" gave a right to renewal in perpetuity, I do not think they do for this reason, namely, that the words "this present covenant for renewal" would be a covenant for renewal for five years with a clause in such renewed lease, or a covenant to renew for five years more. There is nothing to show that the lease to be given at the end of the five years now asked is to include a further covenant for renewal, and so on in perpetuity. The lease to which the Lessees are at present entitled may amount to a lease of 5 or 10 years from its inception at the option of the Lessee. It was decided in *Tritton* vs. *Foote*, 2 Cox 174, that the words "under the same rents, covenants and conditions" did not involve a liability to renew in perpetuity, and I cannot see that the words "including this present covenant to renew," can add any more to the former words than at the outside, to insert a covenant to renew for five years more beyond the present offered lease. Under the former words Lord Thurlow decreed, that the renewed lease should not contain a covenant for future renewal. Here the words including this present covenant, give in my opinion a right, simply to renew for five years beyond the present time. See also the judgment of Sir William Grant in *Moore* vs *Foley* 6 Vesey 232. Had there been an intention to renew in perpetuity, I should have thought we should have found in the place of the words "a new lease for five years from and after the expiration of the present lease for a like term of five years" such words as "from time to time," or other words of similar meaning to show an intention of a series of leases, *Sygulden* vs. *May*, 9 Vesey 330. However it is not necessary in my opinion to decide that point, as the

subsequent words "subject to such further provisoes as may be there eventually agreed on" show clearly that something further was contemplated, than a simple renewal of the lease, *totidem verbis*, on the completion of each period of five years. The counsel for the plaintiff argued that if the parties did not agree that those words must be rejected and a lease on the original terms granted, or, in other words, that unless the plaintiff got exactly what he wished, that he was entitled to a new lease the same as the original lease without any alteration. I do not think I am at liberty to reject the words "in case the parties do not agree," and if the parties do not agree it is impossible for a Court of Equity having regard to those words to decree a specific performance in the way asked. The parties themselves by their correspondence seemed under the impression that further provisos and terms might be inserted, and it was only when they could not agree on the further terms that they came into Court. But even supposing I were of opinion that the words of the covenant in the original lease amounted to a covenant to renew in perpetuity, I should have great difficulty in decreeing a specific performance of the covenant in favor of the present plaintiff. The lease is drawn in a very peculiar way, the lessee is treated as a corporation, and the covenant is with him and his successor. Now even admitting that any person holding the position of the original Lessee, as agent of the Peninsular and Oriental Company, were entitled to the benefit of this Lease and to the covenants therein contained, it does not necessarily follow that the Peninsular and Oriental Company are entitled to put themselves in the place of their agent. The defendant in executing a Lease may have preferred the responsibility of the agent for the time being to that of the Company, whom he might have to follow to England or some other place, should they cease operations here. It was argued that a covenant for renewal ran with the land, and that the lease was assignable, and that all that Harold Tronson had to do was to assign to the Company. It did not appear, however, that he had done so, and it also appeared that the new Lease tendered was one in the name of the acting agent John Paterson. Besides I notice that there is a covenant on the part of Tronson that he shall not assign the lease or premises thereby devised; no exception is made in favor of the P. & O. Company, al-

though singularly enough there is a proviso immediately following the covenant not to assign, that in case the P. & O. Company shall, at any time after the expiration of five years from July 1858, withdraw their ships from the Port of Calcutta, or otherwise discontinue to navigate between that Port and any other Port to the Eastward of the Cape of Good Hope, on three months notice, it should be lawful for Tronson or his successor to surrender the lease, or any renewed lease. Independently, however, of any objection as to the rights of the present plaintiffs to have a renewal of the lease, I am of opinion that even had the suit been brought by Tronson himself, he would not have been entitled to any renewal even for the period of five years, owing to the parties not agreeing as to the terms.

During the argument my learned brother Morgan threw out that possibly an arrangement might be made and a lease suggested by the Court. This however was rejected by the Plaintiffs on the ground that no one here had authority to consent to such a proposal. This to me is very strange, as they give their agents power to take a lease and tender a lease in the name of their agent Paterson, and when they come in to claim the lease in their own name, there is no one here armed with authority to consent to the further agreements and provisos contemplated in any new renewal. Were it necessary to decide the point, I am strongly of opinion that the P. &. O. Company as a corporation have not a right to come forward and claim a lease in their own name. In this case I do not think an assignee could claim a renewal if the assignment had taken place without the assent of the lessor. There is a covenant not to assign. The covenants are all personal between Tronson and the lessor. In my opinion the decree of the Court below ought to be affirmed with costs.

Decree affirmed accordingly.

HAM *vs.* THE EASTERN BENGAL RAILWAY COMPANY.

Wrongful dismissal—Master and Servant.

Eglinton with *Lowe* for the Plaintiff.

Marshall with *Wilkinson* for the Defendants.

This was a suit to recover damages for wrongful dismissal. 14th,
In the month of March 1863, Mr. Ham, who had previously 15th,

been in the service of the Eastern Bengal Railway, in the Engineer's Department, was appointed Head Accountant and Assistant to the Agent in India at a salary of six hundred rupees a month, and entered into an agreement to serve in that capacity for three years. That agreement was as follows :— 16th, and 17th, Dec. 1864.

Articles of Agreement entered into this 9th day of March 1863, between George Ham of Lower Circular Road in the Town of Calcutta of the one part and the Eastern Bengal Railway Company and hereinafter called the Company of the other part.

The said George Ham engages himself in the service of the Eastern Bengal Railway Company for three years from the 1st day of March 1863, on the following conditions :—

1. He shall reside at such place, and remove from time to time to such place or places, and occupy and employ himself as may be required by the said Company, through the Secretary of the Company for the time being in England, or by the Agent for the time being, appointed by the said Company, to manage the affairs of the Company in India.

2. He shall faithfully and diligently employ himself in the service of the Company as Chief Accountant and assistant to the Agent at such place and places as the said Company through such Secretary or Agent as aforesaid shall require.

3. He shall devote his whole time and attention to the service of the Company, and shall use his utmost exertions to promote the interest of the Company.

4. He shall in all things be subservient to and obey the orders and directions of the said Company, and of the Agent of the Company in India for the time being, so long as they are consistent with the time of this agreement, and shall neither directly nor indirectly be engaged in any other service business or speculation whatever.

And in consideration of the agreements herein before contained on the part of the said George Ham to be done and performed, and of the due and faithful and exclusive services to be rendered by him to

the said Company for three years as aforesaid, the said Company doth promise and agree with him in manner following.

That the said Company shall pay to the said George Ham for the period of the first two years of his services commencing from the said 1st day of March 1863 the sum of Rs. 600 per month, and for the third or last year of the said period of his services the sum of Rs. 700 per month.

That if he shall at any time neglect or refuse, or from any cause become or be unable to perform or comply with all or any of the articles of this agreement, or any of the duties required by him, or all or any of the orders of the said Company or their Agent aforesaid, or shall in any manner misconduct himself, or shall correspond verbally or otherwise directly or indirectly on the affairs of the Company with parties unconnected with the executive of the Company, or shall publish directly or indirectly any information, paper, document, book, or matter of any kind whatsoever affecting the Company, it shall be competent to the Directors or their Agent in India to declare the employment of the said George Ham under this agreement at an end.

That at the expiration of the said three years (provided the said George Ham shall have satisfactorily complied with and performed the Articles of this Agreement) the said Agent shall provide the said George Ham a first class passage to England *vid* Egypt at the expense of the Company.

That, in the event of the Company or their Agent in India becoming desirous to terminate the engagement of the said George Ham at an earlier period than three years from the commencement thereof, they shall be at liberty to do so on giving him six months' notice (signed by the Secretary or Agent or otherwise determinable) at any period of the year on paying him salary for that period, and shall moreover in such case provided the engagement of the said George Ham shall have been terminated without fault or in capacity on his part, provide the said George Ham a first class passage to England at the expense of the Company, and the Company shall also provide the said George Ham

a like passage to England at the expense of the Company in the event of his being under the necessity from illness of proceeding to England; the said Company shall provide the said George Ham a passage to England *viâ* Egypt, or the Cape, at the expense of the Company, provided that it shall be satisfactorily established, that such necessity exists, and it is not occasioned by any impropriety of conduct on the part of the said George Ham, and that he shall be provided with a certificate of good conduct from the Proper officer of the Company in that behalf.

That the said George Ham hereby binds himself under a penalty of Rs. 6,000 to the said Company, diligently, and faithfully, to perform the various matters and things contained in the Agreement. In witness whereof the George Ham and the Agent of the said Company, for and on behalf of the said Company, have respectively hereunto set their hands and seals the day and year first above written.

GEORGE HAM (L. S.)

FRANKLIN PRESTAGE, (L. S.)

Acting Agent,

E. B. RAILWAY.

Onthe 3rd of December 1863, the plaintiff was dismissed without the six months' notice provided in the Agreement. The defendants admitted the dismissal but justified it on the ground of the plaintiff's misconduct.

Levinge, J.—This case has been very fully gone into, witnesses have been examined on either side, and all the circumstances relating to that which forms the subject of the suit have been laid before the Court. And it is impossible that I should not have made up my mind as to what the judgment of the Court should be. If Juries were established in civil cases in this Court, this is a case which would have been tried before a Special Jury, and it is in a peculiar degree a case in which the question would have been one entirely for their consideration. Perhaps the position of the plaintiff would have been better if his case had been submitted to a jury, as there is always a disposition in juries to sympathise with a person in the position of

the plaintiff. I cannot say that I do not share that sympathy. But at the same time, though I am of opinion that the defendants have not made out a case justifying the summary dismissal of the plaintiff from their service, I think that the evidence has disclosed a state of affairs that rendered it extremely difficult, if not altogether impossible for Mr. Prestage, the Acting Agent for the Company, to carry on the business of the Company in its connection with the duties to be discharged by Mr. Ham. But what he ought to have done was to have given six months' notice to Mr. Ham to determine his engagement. This was not done. In order to justify the dismissal of a servant on the ground of misconduct, I am of opinion that mere venial faults are not sufficient, but that there must be something gross in the acts or duties committed, or omitted, to warrant a summary dismissal. Looking at the acts relied upon here in justification of the dismissal, I do not think they are of that nature or gravity to warrant a dismissal without notice. There is no charge of want of capacity on the part of Mr. Ham to fulfil the duties of the office to which he was appointed. That is stated, and very improperly stated, as one of the grounds of dismissal. But it was not attempted to show that there is the slightest ground for any such imputation. Indeed it was admitted by the learned Counsel for the defendants that he was perfectly qualified for the office; and there cannot be a doubt that Mr. Ham is a gentleman of very considerable attainments and ability, and possessed of every capacity and qualification for such an office. Then what are the grounds upon which his summary ejection from the employment of the Company is attempted to be justified. The first reason assigned in Mr. Prestage's letter is "for persistently disobeying my orders and instructions by corresponding with me, instead of personally attending at my office, to dispose of the business of your office." The evidence in support of this is that in the month of August Mr. Prestage had remonstrated with the plaintiff, for communicating by letter instead of waiting upon him personally and receiving his instructions verbally, and that subsequently Mr. Ham had written a letter to Mr. Prestage, enclosing three letters about some business in the office and that he had sent him a memorandum

of a great many matters, to which it appears he might properly have called the attention of the Agent, but which Mr. Prestage says he ought to have communicated by waiting upon him, and not by writing. It appears to me that a peremptory order never, under any circumstances to communicate by writing, would not be a reasonbly order, if such order were given; and that the two instances given in evidence of a disobedience of a direction of a less peremptory character, did not constitute such disobedience as would form any ground for dismissal; and certainly falls very far short of that gross misconduct which in my opinion must be established in order to make out the justification upon which the defendants rely. The next reason assigned is "for communicating the affairs of the Company with persons not connected with the Executive of the Company." There is no doubt by the Regulations and in the Agreement into which the plaintiff entered with the Company a prohibition against corresponding "verbally or otherwise directly or indirectly on the affairs of the Company with parties unconnected with the Executive of the Company." But the circumstances under which the communication relied upon took place, taken in connection with the person to whom it was made, do not appear to me to make out the case of infraction of this regulation. It appears that Mr. Ham had addressed a letter to Mr. Prestage with reference to a Meeting connected with the Audit Department, complaining that such Meeting had been held without his being present; and that he had allowed Mr. Cooke, the Assistant Consulting Engineer to the Government, to take away a copy of that letter for the purpose of shewing it to Captain Taylor, the Consulting Engineer to Government. Mr. Cooke and Captain Taylor had a right to inspect all the papers and documents of the Company, and in the interests of Government under the terms of an agreement between the East India Company and the Railway Company, to investigate the affairs of the Company, and I do not think that the allowing Mr. Cooke, at his own request, as he himself said, to take away a copy of that letter was a communication of the Company's affairs to a person not an Executive officer of the Company within the meaning of the prohibition. The third reason I have already partly dealt with, namely,

"for incapacity or neglect of duty." For the former there is not the slightest foundation; and with respect to the latter, the only evidence is that on one occasion Mr. Ham sent to the Agent a statement of the Finances of the Company, which it is the habit to transmit by each mail to the Board in England, prepared by a Baboo in his office without having looked over it himself, and which, he admitted, contained some sentences that were unintelligible. But I cannot regard this oversight on one occasion to revise and correct a document before sending it into the Agent, as gross misconduct justifying a dismissal. The fourth reason is "for disobeying my orders and directions by submitting to Government a Pay Bill for sanction which I had refused to sign and send forward." The facts with respect to this matter are these:—It appears that the chowkeedaree tax was assessed upon the Company's Station at Ranaghaut, and that the Pay Bill after it had been signed in due course by Mr. Ham for the allowance of the payment, was sent in by him to the Acting Manager, whose signature also was required. Mr. Prestage did not sign the bill; but caused his clerk to write across it the words, "the Acting Agent declines to sign this bill as he is not satisfied that the Company are liable." After the bill was returned to Mr. Ham, he wrote upon it the following memorandum:—"The Chowkeedaree Tax must, I think, be paid without further delay, otherwise the authorities will seize the Station furniture. I should not have signed this bill unless I had thought it was a fair claim against the Company." It appears that the tax was afterwards paid under protest. I cannot regard this as such an act of disobedience or misconduct as the defendants are bound to establish in order to make out their justification. The fifth reason is "for making notes on Pay Bills after they had left my hand." The Chowkeedaree Tax Bill is one of the alleged instances. The other has reference to what has been called the contingent Pay Bill. This was a Pay Bill for some small expenses incurred at an Office of the Company, Mr. Payne's office, and with respect to this the proceeding was altogether irregular, and I cannot see that Mr. Prestage was not himself in fault; for it appears that contrary to the regular practice in the office he affixed his signature to the bill before it had been signed by Mr. Ham. It went before Mr.

Ham with Mr. Prestage's signature upon it, and Mr. Ham did not sign it, but wrote upon its face in red ink a memorandum to the following effect:—" Mr. Payne broke up his office establishment in August and took up his new duties in the Chief Engineer's office on the 30th August. Punkawallahs Chairmen could not, therefore, have been employed by him in Koomar district during the month of September: I cannot pass this bill without special instructions." (Signed) "GEORGE HAM, Chief Accountant." I think Mr. Prestage was himself in the first instance to blame for departing from the established usage in signing the bill before it had passed through the Accountant's Office; and it is altogether too frivolous to form any justification. The sixth is, however, a charge of the most serious character, one that should never be made lightly, nor without the strongest and most convincing grounds. It imputes that Mr. Ham told untruths to screen two of his acts. Of one of the alleged untruths we have heard nothing—no evidence has been offered: as to the other some evidence has been given of a conversation upon the 1st of December between Mr. Prestage and Mr. Ham at which Mr. Payne was present, and at which, according to the evidence of Mr. Prestage and Mr. Payne, Mr. Ham asserted that at the time when he wrote the red ink memorandum upon the Contingent Pay Bill, it had not been signed by Mr. Prestage. Mr. Ham, on the other hand, asserts strongly that he never made any such statement. Persons may very easily be mistaken as to what is said at a conversation, particularly where they are under any exciting influence, such as anger. No doubt some conversation and controversy took place about the memorandum previous to the letter of suspension on the 1st of December, and I have not the slightest doubt that each gives that which he believes to be a true account of what was said. But I could not on such evidence arrive at the conclusion that Mr. Ham was guilty of an untruth, and indeed, I think, the probalities are very strongly against it, as Mr. Ham, from his whole course of conduct and character, is evidently not a person likely to shrink from the responsibility of what he has done. There was a ground of justification given in evidence in addition to those specified in Mr. Prestage's letter, namely, that Mr. Ham, notwithstand-

ing, by the regulations of the Company, officers in India are prohibited from communicating with the Board of Directors in England, otherwise than through the Agent, had done so in the month of September. That was, no doubt, improper, but does not constitute, in my opinion, gross misconduct justifying dismissal. Although I think it extremely probable that Mr. Ham was in some respects over-officious, I think I must acquit him of any misconduct. I, therefore, think that the defendants have failed to make out their justification, and that the plaintiff is entitled to judgment.

With reference to the damages, I think the plaintiff is entitled to six months' salary, having been entitled to six months' notice, which was not given, and he is further entitled to the cost of a first class passage to England, since by the contract the Directors undertake to forward him to England free, in case they should determine the service before the expiration of the three years.

Judgment for the plaintiff, damages Rs. 4,710.

NAWAB NAZIM OF BENGAL *vs.* RAJAH PROSONONARAIN DEB BAHADOR.

Act VIII makes no provision for compensation of Witnesses for loss of time.

Mr. Dowleans, who had been in attendance as a witness for 17 days, applied for compensation.

August 17, 1865.

Levinge, J., enquired whether he claimed compensation on account of travelling expenses, or simply for loss of time.

Mr. Dowleans said, that he had incurred no expense in travelling; his claim was for loss of time.

Levinge, J. said, that under these circumstances he could award him nothing. If the witness had asked for compensation for expenses incurred in travelling, the application might have been granted, but Act. VIII, according to his (the learned Judge's) interpretation, made no provision for compensation on account of loss of time.

Application refused.

Hurranchunder Gangooly *vs.* Shibchunder Mitter.

In a suit brought in the High Court, where the Plaintiff shall recover less than 1,000 *Rs., no costs can be awarded, unless the Judge shall certify, that the action was fit to be brought in the High Court, by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes.*

Lowe for Plaintiff.

The Defendant was unrepresented.

In this cause an *ex-parte* decree was made in favour of the Plaintiff for Rs. 492-12, the balance due on certain transactions in Company's Paper. Sept. 16, 1864.

Lowe applied for costs, stating that the suit was brought in the High Court instead of the Small Cause Court, because it was thought necessary to attach the defendant's property before Judgment, and no attachment before Judgment could be obtained in the Small Cause Court.

Phear, J., said, he could award no costs. Act XXVI of 1864, Sec. 9, enacted that "if any action shall, after the passing of this Act be commenced in the High Court, for any cause other than those specified in Sec. 100 of Act IX of 1850, for which a summons might have been taken out from a Court held under the said Act IX of 1850 or under this Act, and in which such Court would have had Jurisdiction, and if a verdict shall be found for the Plaintiff for a sum less than 1,000 Rs., if the said action is founded on contract, or less than 300 Rs. if it is founded on wrong, the Plaintiff shall have Judgment to recover such sum only and no costs, unless the Judge, who shall try the case, shall certify that, by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes, the action was fit to be brought in the High Court." The reasons given by the learned Counsel in no way took the case out of the operation of this section. The decree was for a sum less than 1,000 Rs., and the Court had no power to give costs.

Application refused.

The Goosery Cotton Mills Company, Limited *vs.* James Steel.

Defendant applied for 100 *shares in a Company and on their being allotted to him paid* 1,000 *Rs. deposit. His name was placed upon the Register of shareholders, but he refused to sign the Articles of Association. Held that he was not liable as a shareholder.*

Graham with *Woodroffe* for the Plaintiffs.

The *Advocate General* with *Evans* for the Defendant.

This was an action to recover the sum of Rs. 5,000 being the amount of two calls upon one hundred shares in the Goosery Cotton Mills Company, Limited. July 12, 1864.

The chief facts in the case, which were admitted on both sides were as follows. One hundred shares in the Company were, on the application of the defendant, allotted to him on the 6th of October 1863, and on the 29th of the same month he paid Rs. 1,000 as deposit on them. The defendant's name was placed upon the Register of shareholders, and a copy of the articles was sent to him for his signature which was refused. It did not appear that he had signed any paper with reference to the shares except a letter in answer to repeated demands for calls, in which he stated that he preferred forfeiting his deposit money to retaining an interest in the company.

The only question was whether there was such an acceptance of the shares, &c., as would make the defendant a shareholder of the Company. At the time of the allotment of the shares in question the Company was carrying on business under Table B. of Act XIX. of 1857, by the first clause of which it is enacted that no person shall be deemed to have accepted any share in the Company, unless he has testified his acceptance thereof by writing under his hand, in such form as the Company from time to time directs.

The Articles of Association of the Company were dated the 15th December 1863. the first clause of which provided that Table B. of Act XIX, of 1859, should not be binding on the Company, save in so far as the same were thereby in whole or in part made applicable.

The 18th clause was as follows; "No person shall be deemed a shareholder or entitled to any benefit as such unless he shall have executed these presents or a copy thereof."

For the plaintiff the following cases were relied on :— *Bloxam's* case vol. 12 Weekly Reporter, p. 700. *Burnes* v. *Pennell* 2 House of Lords Cases 497. *Yelland's* case 5 De Gex and Sm, p. 395.

The *New Theatre Company, i. e.* Bloxam's case was one where a person applied verbally for shares in the Company, and paid the deposit required on application upon a promise from the Secretary that if the applicant did not get the shares, the deposit should be returned to him. The shares were afterwards allotted to him, and his name was entered in a book described as the Register of Allotments, but no notification of the allotment was made to him. On the Company being wound up, it was held by the Master of the Rolls that notice of the allotment was not necessary, and that he was a contributory.

In *Burnes* vs. *Pennell.* 2 House of Lords Cases, p. 497, in appeal from a decision of the Lord Ordinary in Scotland, affirming his Lordship's decision, it was held that in a Joint Stock Company where certain forms were to be observed by any transferred of shares before he could became a member of the Company, a party purchased shares and executed some of the acts required to constitute him a member of the Company but left one of these acts unexecuted, the purchaser was unable to retire from his contract and was liable for calls made on behalf of the Company.

In *Yelland's case* 5 De Gex and Sm. p. 395, the Vice Chancellor Sir James Parker held that an allottee was liable as a contributory, to whom shares had been allotted upon an application by letter from the managing Director of the Company, and on which shares the allottee had paid a deposit at the Company's office; but he never executed the deed of settlement which provided that upon execution of the deed, the person executing being otherwise duly entitled should be entered on the list of the shareholders &c., and should

thenceforth, but not before, assume the liability and privileges of a shareholder. This case was afterwards over-ruled on appeal. See. 21 L. J. (Chy.) and was cited in support of the defendant's case.

In *re* the Electric Telegraph Company of Ireland *Cookney's* case 26 Beavan p. 6 was also cited.

For the defendant it was contended that he was not a shareholder, and that he had elected to forfeit his deposit. He relied in support of his case on Act XIX of 1857 Sec. 20, which makes the amount of calls for the time being unpaid on a share, a debt to the company,—and on the case of The *New Brunswick* and *Canada Railway* vs. *Muggeridge* 4 H. and N. 160. In that case a Company incorporated under the Joint Stock Company's Act 1856, issued a prospectus at the foot of which was a printed form of application for shares. By the prospectus it was requested that each applicant in filling up the form would state for which class of shares he applied, and that all applications must be accompanied by a remittance of £2 as a deposit on each share, and should less be allotted, the amount paid in excess would be returned. The defendant paid into the Bank £600, and filled up and sent the printed form to the Directors, wherein he requested that 100 shares of class A. should be allotted to him, and thereby agreed to accept such shares or any less number that might be allotted to him, and pay the future calls. 50 shares of class A and 200 of class B were allotted, and £100 returned to him. A printed copy of the memorandum and articles of association, at the foot of which there was a form of memorandum consenting to be a shareholder, was sent to be defendant, but it was not *signed* by him. The defendant received a notice that the share certificates and interest warrants were ready, and he requested that they might be sent to him. His name was placed on the register of shareholders for the share allotted to him, but in an action for calls it was held by the Court of Exchequer, that the defendant was not a shareholder of the Company, and this decision was afterwards upheld in the Exchequer Chamber: 4 H. and N. p. 580.

Macpherson, J.—This case appears to me to turn upon the Joint Stock Companies Act XIX of 1857 and the Articles of Association;

Sec. 7 of the Act provides that special Regulations may be prescribed by the articles of association, and under section 8 the articles when registered, bind the shareholder as if he had duly executed the same, and there were in such articles contained a covenant to conform to all the regulations thereof.

Sec. 17 provides that no trust shall be entered on the Register, and that every person who has accepted any share, and whose name is entered in the Register of Shareholders and no other person, (except a subscriber to the Memorandum of Association) shall for the purposes of the Act be deemed to be a shareholder, and Section 20 makes Calls a debt to the Company. Table B. does not apply to this case, inasmuch as the Company is registered under special Articles of Association, and accordingly this case must turn on the language of such articles.

Sections 8, 15, and 17 of the articles provide for the making and recovering of calls and the forfeiture of shares, and Section 18 provides as follows as to who shall be deemed to be a shareholder " No person shall be deemed a shareholder or entitled to any benefit as such, until he shall have executed these presents or a copy thereof."

It has been contended that the only object of this Section is to preclude any one from receiving any benefit who has not executed, but I do not think such a contention can be maintained ; the plaintiff must stand or fall by the articles, and I think that under them the defendant is not a shareholder. The principle of the cases of the *Waterford, Wexford, Wicklow* and *Dublin Railway Company* vs. *Pidcock* and the *New Brunswick* and *Canada Railway* vs. *Muggridge* must prevail in this case.

Yelland's case *Cookney's* case and *Bloxam's* case are cases of contributories, and in addition to that they all turned on the question of acceptance or no acceptance, and not upon the construction of any particular clause. The latter case was decided under the New English Act of 1862, which differs materially from Old Joint Stock Companies, and from which the word Shareholder appears to be carefully excluded. The suit must be dismissed with costs No. 2.

Dismissed Accordingly.

JOHN CARLISLE AND OTHERS *vs.* NUTHUNULL NOWLUCKA AND OTHERS.

Where a contract is partly printed and partly written, and there is a conflict between the printed and written part, the written part must be taken to control the printed part.

The *Advocate General* with *Newmarch* for plaintiffs.

Graham with *Woodroffe* for defendants.

The plaintiffs, Messrs. Carlisle, Nephews and Co., sought to recover from the defendants, who are Piece-goods Dealers in Burrah Bazar, Rs. 8661-1-6, as damages sustained by them in consequence of the defendants having failed to take delivery of, and pay for, 154 bales of Grey Shirtings. It appeared that on 9th October, 5th November, and 13th November last, the defendants agreed with the plaintiffs to buy from them 269 bales of Grey Shirtings, at different prices. There were contracts on the printed forms in use by the plaintiffs in which the names of the ships, of the purchasers, and the numbers and market prices of the bales were filled up in writing. At the foot of the contracts of 9th October there was written "delivery to be completed on or before the 29th instant, after which date interest will be charged at the rate of 8 per cent per annum." At the foot of the contracts of 5th November, there was a similar written memorandum that delivery was to be taken in 5 days, and, in the contracts of 13th November, that delivery was to be taken in 10 days. All the contracts in the printed part contained these clauses:— July 25, 1864.

"The goods to be cleared, settled and paid for within 40 days from this date, otherwise the deposit of Rs. —— shall be forfeited to the sellers, no discount allowed, and the goods shall be resold on account the purchaser, any loss on which re-sale he must make good, besides forfeiting the deposit, and he shall not have any claim to any advantage arising from such resale."

"No deduction for damage or for any other defect in the goods shall be allowed after the expiration of 15 days from the date of this agreement, whether the goods be cleared or not cleared, neither shall any deduction be allowed for any defect discovered in the goods after they have left the seller's godowns."

It was proved that on different dates between 28th November and 2nd February the defendants took delivery of 115 bales, that they gave *Chittees* or Promissory Notes for the purchase money, and made payments on account of them, from time to time, until 3rd March, after which they declined to make any further payment, alleging that the goods were damaged. Upon this an action was brought against them to recover Rs. 11,600, the Balance due for the goods delivered, which was settled in April by the plaintiffs giving up between 4 and 500 Rs. of the amount, as they said on account of the interest, but the defendants alleged it was an allowance made in consequence of the goods being damaged. After the settlement of the action, the defendants for the first time went to inspect the 154 bales, which remained in the plaintiff's godowns undelivered. A few of them were opened, and, as they refused to take delivery, the bales were resold by the plaintiffs in May, and the result was that including interest and Rs. 591, which was claimed for Fire Insurance and godown rent, the difference between the prices at which the goods were contracted to be sold, and those obtained on the re-sale, was Rs. 8661, the sum sought to be recovered in the present suit.

It was proved that after the contracts of 13th November, the market fell; that in December, January and February, prices were almost nominal; and that the market, when the re-sale took place, was better than it had been at any time since November.

The plaintiffs, in their written statement, alleged that all the goods were in merchantable condition except 20 bales which were mildewed at the time of re-sale, and were not then merchantable. It appeared, however, that the contract price of these bales was Rs. 8 and 11 annas per piece, and that on the re-sale the difference was only 9 annas. Two of these 20 bales were produced in Court by the defendants and appeared to be badly damaged.

The defendants, in their written statement, denied that the goods were of the quality contracted for, and at the trial they contended that the goods were damaged, and that they were therefore justified in refusing to take delivery of them.

Peterson, J.—The plaintiffs in this case, trading under the name and style of Carlisle, Nephews & Co. sued the three defendants, Nuthnull Nowlucka, Greedhareeloll Bhara, and Bhoyronath Pauray, as trading under the firm of Nuthmull Nowlucka. The plaintiffs abandoned their action against Bhoyronath Pauray: as against him therefore the suit must be dismissed. The alleged cause of action was the damages sustained by the plaintiffs by reason of the defendants failing to take delivery of 154 bales of Grey Shirtings, and the loss on re-sale, interest, insurance, ware-house room &c. These 154 bales were a parcel of a larger number of bales purchased by the defendants on three several days, *viz.*, the 9th of October, the 5th and the 13th of November, and of which part delivery had actually taken place, and in respect of which the plaintiffs had been paid, although not until after action was brought. The contracts, under which they sued, were printed and certain writing in English was inserted in each. The first contract of the 9th October 1863 was for 213 bales of Grey Shirtings of specific marks and numbers, set out in the English language. In writing, at the foot of the document, there was a clause in English,—" Delivery to be completed on or before the 29th, after which date interest will be charged at the rate of 8 per cent. per annum." The second set of contracts was dated the fifth of November. On these were set out, in English writing, the marks and numbers; and there was, at the foot of each, a clause in writing that delivery was to be taken within five days from the date, after which interest to be charged at the rate of 8 per cent. The third set of contracts of the 13th November, in like manner, set out the marks and numbers, and the writing in English at foot, that delivery was to be taken within tendays from the date, or interest to be charged at 8 per cent.

The plaintiffs alleged that under the above contracts the defendants commenced taking delivery on the 28th of November, and took delivery up to February 2nd, leaving at the last date, 154 bales of goods in the hands of the plaintiffs. That as the defendants took delivery, they gave the plaintiffs promissory notes for the amounts of goods so delivered, and received cash from time to time in respect

thereof. In consequence of the defendants neither taking delivery nor paying in respect of what was delivered to the satisfaction of the plaintiffs, the latter, through their attorneys, called on the defendants to pay the balance due for what was delivered, and also to take delivery of, and pay for, the residue. In consequence of the defendants' neglect, an action was brought, on 30th March 1864, for the balance of the goods delivered, and, on the 4th of May the plaintiffs proceeded to sell the 154 bales, and on sale they realised a loss of 8,661 rupees. This sum includes interest, charge for ware-house room and for Fire Insurance. The defendants, by their written statement, admit the contracts, and go into a rambling statement as to matters connected with the other suit, and which are utterly immaterial to the present suit. In fact the only portion of the defence bearing on the present case is that raised by the eighth paragraph, in which they deny that the goods were of the quality contracted for, at the prices mentioned. Having regard to the nature of the contract, as there was no guarantee of quality, nor sale by sample, the point raised was immaterial so long as the goods were in a merchantable condition as Grey Shirtings. The plaintiffs proved the contracts, the re-sale and the loss, making a total claim of Rs. 8,661, 6. This included items for Fire Insurance, godown rent, and also a deduction from the prices sold for interest for forty days at 8 per cent. the usual *prompt* allowance. On the cross-examination of the witness, Calleechurn Bhose, the import godown sircar of the plaintiffs, the man who explained the contracts to the defendants, he admitted that he had only explained the part written in English at the foot of each contract; but, in answer to a question from the Court, he said that with new customers he explained the whole of the printed part, but the defendants, as old customers, knew it. The plaintiffs by their written statement, in my opinion foolishly, admitted that 20 bales of the 154 were in an unmerchantable condition, although it appeared that, even when sold as damaged, there was only a loss of about 7½ to 8 per cent. on original prices, and Mr. Brown, in his evidence, stated, that out of the 20, at least 10 might have been taken, with some small allowance. It was contended by the Counsel for defendants that the only contract was that portion

in English at the foot of each contract, and that the defendants were not bound by the printed portion of the contract, and that the breach of contract took place on the non-performance, by the defendants, of the contract on the expiry of the days mentioned, and that the damages, if any, should be calculated as of those days. The defendants contended that they were not bound by the clause as to allowance for damage to be claimed within fifteen days, and that they ought not to be compelled to take damaged goods. On behalf of the defendants, witnesses were called to prove that the goods were damaged and that that was the reason why they did not take delivery. The *gomastha* of the defendants swore that about the 20th of April, he went to the godowns of the plaintiffs, and cut open and examined 50 bales of the 154, and that they were so damaged that he would not take them: to corroborate this man, another witness, named Nunko was called, who far from corroborating the last witness, swore that only 6 or 7 bales were cut open and examined, and of these 6 or 7, 2 or 3 were damaged, the rest sound. Two of the damaged 20 bales were brought into Court, and one cut open: it certainly was very much damaged, several pieces of cloth being rotten. The above is a summary of the evidence and pleadings. I am of opinion that the contract the defendants entered into was the contract *printed* and *written*, that where there is any conflict between the writing and the printed portion, the written must control the printed part; that in the present case the contract was a specific contract of certain specific chattels, and that, as long as they, or any of them, were in a merchantable condition, the defendants were bound to take them. In case of the chattels or any of them being in a damaged condition, that the claim for damage was to be made before the goods left the plaintiff's godowns. and in any case within fifteen days from the date of contract. That the only effect of the written portion as to delivery within so many days after which interest was to commence, was to do away with that portion of the printed form which allowed discount for *prompt* at the rate of eight per cent. for three months, and that although they had forty days to take delivery, still that if they did not take it within the days, at foot of contract as suggested by the defendant's Counsel, it would be simply a purchase of so many bales of Grey Shirtings, of certain

marks and numbers, and the defendants would be bound to take them, merchantable or not, and with no allowance for damage. I have no doubt in my mind as to what the contract is, and that the alleged want of explanation does not vitiate the contract. The question therefore is, what are the damages to which the plaintiffs are entitled ? I shall not allow the loss on resale of the 20 bales, I shall not allow the insurance or godown charges, I shall allow the deduction from realization on resale as claimed by the plaintiffs, but for that allowance for *prompt*, the goods would have sold for so much less. I allow interest from commencement of suit to judgment at eight perc ent. From judgment at six per cent. Decree for Rs. 7,394-7-0 and costs No. 2

Decree accordingly.

REGINA *vs.* SHAIK ABBAS AND MUNEEROODDEEN.

Where two prisoners were charged with distinct offences in the same indictment, the calling of evidence on behalf of one does not give the Crown a right of reply upon the other.

Eglinton for the Crown.

Hyde for Shaik Abbas.

Muneerooddeen undefended.

In this case the two prisoners were charged under separate counts of the same indictment; Muneerooddeen with abducting a girl, and Shaik Abbas wlth confining the girl after she had been so abducted. Evidence was called on behalf of Shaik Abbas, but not on behalf of Muneerooddeen.

Dec. 7, 1864.

Eglinton began a reply to both prisoners but was stopped by the Court.

Macpherson J.—If the prisoners had been indicted jointly and evidence had been called on behalf of one, the Crown would have a right of reply upon both. In this case however the prisoners are indicted under separate counts in the same indictment The charges are distinct and the Court has a right of reply upon that prisoner only in whose behalf evidence has been called.

ISSUREPERSAUD *vs.* URJOONLOLL AND OTHERS.

A suit is not barred by the Statute of Limitation as against parties added after the expiration of the period allowed by law, provided the plaint be filed against the original parties prior to the expiration of such period.

Hyde for Plaintiff.

Cowell for Defendant Urjoonloll.

The other defendants were unrepresented. **Dec. 8, 1864.**

In this case the plaint was filed in April 1864 to recover the price of goods sold and delivered in May 1861. The suit was originally brought against 6 defendants only, but in July leave was asked and obtained to add Urjoonloll as a party. Amongst other objections it was now pleaded that as regards Urjoonloll the suit was barred by the Statutes of Limitation.

Levenige J.—said he was clearly of opinion that the suit was not barred as against Urjoonloll. The suit was begun before the expiration of the three years, and the fact of Urjoonloll being subsequently added as a party did not affect the question. The suit might proceed.

Ordered according:

BUDDRENATH *vs.* ISSOREEPERSAUD.

The Court will not except for some very cogent reason order principal parties to leave the Court during the hearing of a case.

This was a suit for a partnership account. The plaintiff alleged a partnership which the defendant admitted but denied that any transactions had taken place under it. A number of witnesses appeared on either side, and a conflict of testimony was expected. Nov. 21, 1864.

Eglinton for the plaintiff applied that witnesses on either side might be ordered out of Court.

Doyne for the defendant made no objection to the order as regarded witnesses, but submitted that it ought not to extend to the defendant personally. It was very desirable that the defendant should remain in Court for the purpose of instructing his Attorney.

Phear, J. said, that he would make an order for the witnesses to leave, but he thought that such order ought not to extend to the defendant. In England when witnesses were ordered out of Court it was customary to allow principals to remain, and he saw no reason why the same rule should not be followed here. There might be cogent reasons which would necessitate the Court's ordering principals to leave, but in this case none such were presented. The witnesses under the circumstances must leave the Court, but the principals might remain.

Order accordingly.

W. GRANT *vs.* RADHAKANT SEN.

The Court will not press hardly upon a defendant who tenders a reasonably substantial payment.

Mr. Pittar for the plaintiff.

The *defendant* was unrepresented.

This was an action brought to recover the sum of Rupees 4,000 due on a Promissory note which had been dishonored. Defendant admitted the debt and tendered Rupees 2,000, in present payment, pleading inability to pay more at the moment, and asking to be allowed to pay the remainder by instalments. May 17, 1864.

Pittar for the plaintiff objected to time being given. His instructions were to ask for a decree for the full amount at once.

Peterson, J, after a close examination of the defendant said he thought that in this case there were good grounds for the defendant's application. The defendant had admitted the debt and tendered Rupees 2,000 in present payment, pleading inability to pay more in consequence of late business failures. The evidence went to shew that the defendant's statement was based upon fact, and the Court would not press too hardly upon him. The decree would be for the immediate payment into Court of Rupees 2,000, and for payment of the remainder by three equal fortnightly instalments, execution to issue for the whole amount due in the event of failure in any respect.

Decree accordingly.

NILMONEY SING DEO, (RAJAH OF PACHETE) *vs.* BULLODEB DUTT.

Rajahs and their Mooktears.

Graham with *Woodroffe* for Plaintiff.

The *Advocate-General* with *Eglinton* for Defendant.

The following are the facts of this case, as they transpired in evidence. In the year 1859 the Rajah of Pachete was placed on his trial, at Burdwan, on charge of implication in the rebellion of 1857. For some time previously to his trial he had been a close prisoner in the Burdwan Jail. Messrs. Longueville Clarke, Peterson, and Newmarch were retained for his defence, and instructed by Mr. Paul, an Attorney of the then Supreme Court. Mr. Paul understood the language of the Rajah and his people (Bengalee) perfectly. During the time he was employed in preparing the Rajah's defence, he (Mr. Paul) was assisted by a staff of his own writers and clerks, whom he had taken to Burdwan for that purpose. While the Rajah was in Jail the defendant was introduced to him. He had never before seen, or had any business with the Rajah. The defendant remained in attendance on the Rajah, and the Rajah after his acquittal, and after his return to Pachete, made over to the defendant Rs. 4,000 in half notes. The Rajah declared that these half notes were given to the defendant solely for

June 2, 1864.

the purpose of getting them cashed, and produced a receipt for them expressly reciting that circumstance. The defendant detained the money for his own use, and the Rajah now sued for the recovery of the money. It was admitted that the other halves of the notes were lost.

The story of the defendant was, that the notes were given him by the Rajah as a reward for services rendered to him in connection with the trial; that during the whole period of the Rajah's incarceration he was actively employed as one of the Rajah's Mooktears, his son acting as interpreter between himself and the English lawyers; that the Rajah by his mooktear Nilcomul had given him a written promise to pay him Rs. 5,000 after his acquittal. When the Rajah returned to his own place, after his acquittal at Burdwan, the plaintiff and his son followed him. At Pachete the Rajah became anxious to ascertain whether the Bank of Bengal would cash some half notes in his possession, and in order to test this gave the notes to the defendant, who, thereupon, proceeded to Calcutta with them. He returned to Pachete with the information that they would be cashed, on which the Rajah gave them to the defendant for his trouble, and in part payment of the sum of 5,000 due in the event of the Rajah's acquittal.

All this was wholly denied by the Rajah, who admitted that he had authorized the defendant to retain Rs. 1,000 out of the proceeds of the half notes, as a reward, but no more.

The son of the defendant in this case had a suit pending against the Rajah for fees due to *him*, independently of the money alleged to have been given to the father for their joint services.

In the earlier stages of the case, an order had been obtained for the personal attendance of the Rajah to give evidence; and it was urged by the plaintiff that this was for the mere purpose of compelling the Rajah to pay the money demanded, in order to save himself the trouble and annoyance of being dragged down to Calcutta to give his personal testimony. This order for the Rajah's attendance in person was afterwards cancelled, on an application made to the Court on this behalf; and a Commission was granted to the defendant, to examine the Rajah at Pachete. Of this Commission the defendant had declined to take advantage, urging

his inability to pay its necessary expenses. The plaintiff, on the other hand, declared that the real reason why the Commission was not issued, was the dread which defendant entertained of the evidence the Rajah would give on oath.

Macpherson, J.—What I have to find, in this most unsatisfactory case is, whether the defendant Bullodeb Dutt, was, or was not, authorized to pay himself the proceeds of the four half notes made over to him by plaintiff for realization at the Bank of Bengal. It is not disputed that the notes belonged to the plaintiff; nor is it disputed that he gave them to defendant; nor that the defendant received Rs. 4,000 for them from the Bank of Bengal. The dispute is solely as to whether the defendant, after realization of the money, had a right to retain it in part payment of a sum of Rs. 5,000 which he declares the Rajah owed him, in consideration of services rendered as Mooktear. As regards the evidence in this case, it is of two kinds; first, the verbal testimony of the witnesses here, and two documents; and secondly, the correspondence which has taken place in the matter. I shall consider them separately. In support of the defendant's case we have, 1st, the direct evidence of a written agreement made by Nilcomul (one of the Rajah's people) to pay the defendant the sum of Rs, 5,000 for his services if the Rajah was acquitted; 2ndly, evidence of a promise to the same effect said to have been made by the Rajah himself; and 3rdly, the evidence of the defendant, and his son, and his sircar, as to the circumstances under which the defendant acquired his alleged right to keep the money when realized from the Bank of Bengal upon these notes. In corroboration of that direct evidence we have the length of time which has elapsed since the Bank notes were made over to defendant, and realized, and retained by him. And there is also the fact that the, indemnity bond to the Bank was in the defendant's own name. We have also what I must admit to be one of the probabilities of the case *viz*, the fact that the Rajah was at the time in circumstances under which it would not be at all unlikely for him to give promises, or make payments to a man, who had been employed by him in connection with his case. That the defendant was so employed is to my mind quite clear. It is equally clear that the services he rendered to the Rajah, in such employment were as small and insignificant as possible. But still he was em-

ployed; and he did to some extent busy himself in the Rajah's affairs during his trial, and subsequently proceeded with him to Pachete. As to the agreement alleged to have been come to by the Rajah and the defendant, in the Burdwan Jail, on the first introduction of the latter, I should not be prepared to find on the evidence that any such agreement was made. But I see no reason to doubt the letter produced, and relied on by the defendant, as setting forth the promise of payment. I believe it was signed by Nilcomul; he, indeed, himself admitted the signature, though he could not account for its being at the foot of such a document as it turns out to be. The general result I arrive at is this: This letter of agreement was signed by Nilcomul; he, being a professional Mooktear long in the service of the Rajah. I do not believe he would be likely to sign an English paper for Rs. 5,000, presented to him as this document was, without being well aware of what he was about. I find therefore that defendant has established the fact of the promise to pay him the sum of Rs. 5,000 in the event of the Rajah's acquittal. My own belief is that the promise was subsequently adopted and ratified by the Rajah himself: the whole of the facts of the case are consistent with that view, and no other. So far I believe the case which is set up by the defendant as to the promise. Then we have these notes made over to defendant, amounting to Rs. 4,000: and here again I believe the defendant's account of what took place. The notes were given to the defendant, by the Rajah, to try whether the Bank would cash them; and when they had been cashed, defendant was, as I believe, authorized to retain their proceeds in part payment of the Rs. 5,000 which had become due to him by the acquittal of the Rajah, his employer. I also believe that the receipt produced by plaintiff is the receipt given by defendant for the notes, when he received them. This, I believe, though the defendant denies it; and I believe that after giving that receipt for the notes sent to be changed at the Bank, he was authorized to keep the money himself. The notes were made over to defendant in the month of May 1859; and it is incredible to me that their proceeds should have been allowed to remain in the hands of defendant unaccounted for and unquestioned at Calcutta, while the Rajah and Nilcomul were at Pachete, without some acknowledged right of defendants to retain the amount. I

cannot believe that if that right did not exist as admitted, the defendant would have been permitted to retain the money without any motion on the part of plaintiff, from May 1859 down to the present time. The whole conduct of Nilcomul would be under other circumstances inexplicable. The notes having been given up in 1859, nothing more was heard about them till the end of 1863, when suddenly the Rajah's Mooktear, after nearly five years silence, threatens a suit for the recovery of the value of the notes from the defendant; while he must have known that they were paid to the defendant long ago.

As to the correspondence, that shows still more the weakness of the plaintiff's case. Having received the notes on the 24th May, the defendant wrote on 29th September to say he had realized the money for them. Nothing more occurs till 23rd November, when he is told to take Rs. 1,000 out of the money for himself, and to remit the rest. In reply to that, the defendant, on the 29th, wrote a letter of remonstrance declaring his right to be paid, not only the Rs. 4,000 he had in his possession, but also Rs. 1,000 more. Nothing further occurs till the next May when the defendant is informed by letter that a man had been sent down to Calcutta, from Pachete, to transact certain business for the Rajah, and that this man would give him further Rs. 1,000, that being exactly the balance claimed by defendant. The genuineness of this letter is admitted, and it cannot but be construed as an admission of defendant's claim for the Rs. 4,000 he had already received, and of the remaining Rs. 1,000 alleged to be due.

I began by saying that the case was a most unsatisfactory one indeed; and I may make the same remark on closing it. There has been throughout it a great want of reliable evidence. It is a pity the defendant himself has not been called for examination. The case is the result of transactions between two persons, both in the service of the Rajah, and both apparently trying which could plunder his master most. It is admitted that the defendant rendered the Rajah little or no service: 5,000 pice would perhaps have been liberal remuneration for what he did.—But as the case

stands there can be no other result than the dismissal of the suit with No. 2 costs.

Suit dismissed accordingly.

. HOWRAH DOCKING COMPANY *vs.* THE "JEAN LOUIS."

The Vice Admiralty Court has no jurisdiction to arrest a British ship on a claim for repairs, although the owners may be colonial subjects.

Doyne for the impugnants.

The *Advocate General* for the promovents.

The *Jean Louis* had been arrested under a warrant issued by the Vice Admiralty Court at the suit of the promovents for necessaries supplied to the ship. It appeared from the affidavit of Mr. W. G. Rose, the Secretary of the Docking Company, upon which the warrant was obtained, that a sum of Rs. 50,141-12-4 remained due for repairs done to the vessel, that she was about to leave Calcutta immediately, and that although demand had been made to the agents of the vessel for payment, it had not been complied with, nor had any security or undertaking to pay the amount been given. Upon these grounds the Court granted the warrant. An appearance was entered by the impugnants under protest, as they denied the jurisdiction of the Court.

Nov. 16 & 17, 1864.

Doyne now moved to set aside the order for arrest. He contended that as the promovents had parted with the possession of the ship, their lien was gone; also that the Admiralty Court had no jurisdiction in this case, for, under the 3 and 4 Vic. C. 65, Section 6, it could only order the arrest of foreign ships, whereas the *Jean Louis* was a British ship, owned by British subjects belonging to the port of Point de Galle. Mr. Gregory, the Agent of the impugnants, had made an affidavit to the effect that the owners were British subjects, residing at Galle, in the Island of Ceylon, and that the *Jean Louis* was a vessel belonging to that port. The certificate of sale from the owners to Mr. Gregory, containing the declaration required by the Merchant Shipping Act, made before the Registrar of shipping at Galle, was of itself sufficient evidence, under Sec. 107 of the Act, of the owners being British subjects. That the power of arresting vessels for necessaries, ap-

plied only to foreign vessels appeared from the 6th Section of 3 and 4 Vic. C. 65, which is as follows: "And be it enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of tonnage, or for necessaries supplied to any *foreign* ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas, at the time when the services were rendered, or damage received, or necessaries furnished in respect of which such claim is made." In support of the argument, was cited the case of the "*Ocean,*" 2 W. Robertson's Reports 368,—also Maude and Pollock on shipping, 3rd Ed : page 65, and the authorities there referred to.

The *Advocate General* opposed the motion on the ground that the arrest was valid, the *Jean Louis* not being a British vessel within the meaning of the Act cited. She was a vessel owned no doubt by "British subjects," but still a colonial ship belonging to the port of Galle, which must be considered in relation to Calcutta as a foreign port. The Acts cited, he contended, referred solely, and exclusively, to vessels owned by British subjects residing in Great Britain. He also submitted that this was a case of implied hypothecation.

Doyne, in reply, argued that there was no such distinction in respect to colonial vessels as that contended for by the learned Advocate General. There were only two classes of vessels *i. e.* British and Foreign, there was no intermediate class. The *Jean Louis* had a British register, she was owned by persons who possessed all the rights and privileges of British subjects, and the fact of their being colonists in no way could make her a foreign vessel.

Phear, J.—In this case the question before the Court is, not whether the promovents have any remedy, but whether under the claim they make they are entitled to institute proceedings *in rem.* If they are not, the arrest was made without jurisdiction, and the order granted by the Court must be set aside. As I understand the case, the ship has a British register; but it was contended on behalf of the

promovents, that although the owners are British subjects, they come under the designation of Colonists, and as such, are not entitled to the full privileges of British subjects. The repairs were executed in Calcutta, but whether or not in the course of a voyage, and for the purpose of enabling the vessel to continue her voyage, does not appear. Now, if the proceedings are well founded, they must rest on one of two grounds, namely, the right of *lien* for repairs, or on the remedy, *in rem*, given by Statute. It cannot, at this time of day, be argued that by English Law there exists a general maritime lien for repairs, and I stated thus much of my opinion to the Attorney at the time I granted the warrant for the arrest of the ship. The circumstances stated when the application was made were, however, sufficient to induce me to allow the warrant to issue, as the question could afterwards be decided in open Court. No doubt by general maritime law a lien for repairs exists in respect of such a claim, but it is settled by the Common Law of England, that the jurisdiction of the Court of Admiralty does not extend to that length. An attempt was made by the learned Advocate General to place the case on the footing of an implied hypothecation. But the principle of hypothecation does not exist here, because, to justify hypothecation, there must be urgent necessity for repairs, and a want of credit in the Master, so that in the absence of the owners, he has no other mode of raising the necessary funds. Here the Master had credit. But even if there were an implied hypothecation, then the application for a warrant was pre-nature, inasmuch as hypothecation is available only at the end of the voyage. It was also contended that this being a foreign ship, I must administer foreign law to the full extent, and, therefore, hold the arrest good. If so, the foreign law, I should have to administer, would be the law of Ceylon, and I conceive that that does not differ from the English law. I agree, however, with the learned counsel for the impugnants that there is no medium between a British and foreign ship, a ship must be one or the other. The *Jean Louis* is a British registered ship, and her owners are persons who are entitled to have their names on a British Register, and, therefore, the law to be administered in her case is the English law. Now, how stands

the case by Statute? The 2nd of William IV. C. 15 is merely declaratory; it does not give jurisdiction, and it makes no mention of repairs. The 3 and 4 Vic. C. 65, Sect. 6 is valuable for the judgments that have been given upon it. In Dr. Lushington's judgment in the case of the *Alexander*, 2 W. Robertson's Reports, p. 293, he says that the Common Law had narrowed the general jurisdiction originally belonging to the Court of Admiralty respecting repairs. The same learned Judge, in the case of the *Ocean*, 2. W. Rob. 369 is still more emphatic on this point. These cases leave no doubt that up to the passing of 3 and 4 Vic. C. 65, there was no jurisdiction to entertain a question of this description in the Court of Admiralty. It is not necessary to enquire how far the Statute applies to a claim like that made in the present case, because I find as a fact that this is not a foreign vessel. I threw out at the time of the argument a suggestion that there was some subsequent enactment passed, as I thought only during the last session of parliament. On reference to it, I find its provisions are confined entirely to the adjudication of matters of prize. I come, therefore, to the conclusion that the order I made for the arrest was made without jurisdiction, and it must be set aside with costs.

Application granted with costs.

LAZARUS *vs.* VICTOR.

The Court of Small Causes under Act IX of 1850 *and Act XXVI of* 1864, *has no jurisdiction over suits of smaller value than Rs.* 500 *on the ground only of the cause of action having arisen within the limits of Calcutta.*

Woodroffe for plaintiff

The defendant did not appear.

This was an action brought after the coming into operation of Act XXVI of 1864, to recover the sum of Rupees 416-6-6, being the balance due to the plaintiff for goods sold and delivered by him at Calcutta to the defendant who resided at Chuprah, to which place he had directed the plaintiff to have them forwarded by Dâk. June 24, 1864.

It was proved that the defendant did not dwell, or carry on business, or work for gain within the local limits of the Town of Calcutta, and that he had not so dwelt, or carried on business, or worked for gain there when the cause of action arose, or within 6 months before the beginning of the suit, so as to give the Calcutta Small Cause Court jurisdiction to entertain the suit under Section 28 of Act IX of 1850. Under these circumstances it was argued on behalf of the plaintiff that the suit did not fall within the provisions of Act XXVI of 1864 so as to deprive the plaintiff under Section 9 of his costs in the High Court. Section 2 of Act XXVI of 1864 conferred on the Courts held under Act IX of 1850, jurisdiction to entertain only such actions as might be brought for sums exceeding Rs. 500 and not exceeding Rupees 1,000, by reason of the causes of such actions having arisen with the local limits of their respective jurisdictions, and did not in any way affect actions for sums below Rupees 500.

Macpherson, J. said, that he entertained no doubt but that the effect of the two Acts taken together was to confer jurisdiction on the Small Cause Courts in respect to actions instituted there, similar to that exercised by the High Court when the sum sued for exceeds Rupees 500 and does not exceed Rupees 1,000, but that such Courts have no jurisdiction over sums not exceeding Rupees 500, by reason only of the cause of action having arisen within the local limits of the jurisdiction of such Courts. The decree would be for the plaintiffs with costs No. 1.

Decree accordingly.

SUMBOONAUTH GHOSE *vs.* JUDDOONAUTH CHATTERJEE.

When the analogy between Native Hoondies and English Bills of Exchange is complete the English Law is to be applied.

Graham for the plaintiff.

The *Advocate General* with *Woodroffe* for the defendant.

June 17 and 20, 1864.

This was an action to recover the sum of Rs. 6,010 on a bill of exchange brought by the indorsee thereof against the drawer.

The defendant, on the 21st of December 1863, drew a bill payable to his order at three months date, upon one Kaliprosono Singh for the sum of Rs. 6,010, which was accepted by Kaliprosono Singh, and by him indorsed to the plaintiff.

The bill at maturity was presented to the acceptor for payment, but was dishonoured, whereupon the plaintiff sued the defendant as the maker.

The defence set up was, that due notice of the dishonour had not been given.

Graham, for the plaintiff, contended,—firstly, that notice had been given—secondly, that notice was not necessary where the parties were Hindoos, and in support cited the case *Gopeenauth and another* vs. *Abbus Hossain*, tried before the Chief Justice Sir B. Peacock in 1861,—and thirdly, even if notice were necessary and had not been given, the defendant had waived it.

Macpherson, J.—This is a suit brought by the indorsee of a Bill of Exchange against the drawer, in default of payment by the acceptor, The bill was made in Calcutta, and is in the English language and ordinary English form, *i e.*

Calcutta, 21*st December* 1862.

"Three months after date please pay to my order the sum of Rs. 6,010 and place the same to the account of

JUDDONAUTH CHATTERJEE.

To Baboo Kaliprosuno Singh, Calcutta."

Baboo Kaliprosuno Singh accepted the bill, the acceptance and signature of the acceptor being written across the Bill in the English language and character. The defendant then blank indorsed the bill in the English character, and delivered it to the plaintiff. The bill fell due on the 21st and 24th March, and payment was demanded from the acceptor but was refused. The defence is that there was no notice of dishonour. For the plaintiff it was contended, that there was due notice, but even if there was not, the defendant waived notice; and that under the circumstances, the parties to the bill being all Hindoos, no notice was necessary.

The first question to be decided is, what law is to be applied to this case. Is it to be dealt with according to English law, or according to any special usage as to bills of exchange prevailing among Hindoos?

In my opinion English law is applicable; the bill was made and accepted in Calcutta in the English form, and in the English language, and this, in itself, creates a strong presumption that the parties at the time of contracting, intended to contract, and believed they were contracting, according to English law. The presumption is strengthened by the acts of the parties; such as their allowing the three days of grace as a matter of of course. Then no evidence whatever has been given of any special nsage as to Bills of Exchange among Hindoos. It was laid down by the late Chief Justice *Colville*, in *Amritram* vs. *Damoodur Doss*, that, "when the analogy between native *hoondies* and bills of exchange is complete, and there is no proof of any special usage, it is right to apply the English Law to them." Adopting that *dictum*, and finding that the analogy is complete, and that no special usage is proved, I shall apply the English Law to this case. This disposes of the issue raised as to whether any notice at all, and if any, what notice is necessary in the case of Native *Hoondies*. It remains to decide whether the defendant had such notice of dishonour, as the English Law requires, and if not whether he waived it. According to the evidence, the defendant clearly had no notice which expressly intimated to him that the holder intended to have recourse to him. He had ample notice of the fact that the bill was not paid at due date; and he knew that the holder was giving the acceptor time, and he consented to the holder doing so. Now a mere intimation of the fact of dishonour may be sufficient notice, without an express declaration of intention to hold the person liable to whom the notice is given (see Byles on Bills 8 Ed. pp. 255-256 and the cases there referred to.) And the mere giving time to the acceptor (as long as the holder in no way ties up his own hands so that he cannot sue), especially if that time is given with the acceptor's consent, will not discharge the acceptor, see Byles on Bills 8 Ed. page 228.

But the circumstances of this case are peculiar, and the conclusion at which I arrive is, that although the defendant was kept informed throughout of all that took place between the plaintiff and the acceptor,

he was so kept informed in such a manner as to lead to the inference that the plaintiff did not intend to have recourse to him, but, on the contrary, that the acceptor was the only person to whom the plaintiff looked and from whom he intended to enforce payment. I think that this is shown even by the evidence of the plaintiff's sircar, who was the only witness called in his behalf. The sircar says, " on the 16th or 17th March I saw the defendant". He said " I remember the due date, it is the 21st 24th.—On that date I shall go to you and take you to Kaliprosunno, and have the matter brought to a termination." On the 21st I went to Kaliprosunno with defendant. Kali said in Juddonauth's presence " I shall make a settlement and pay about 3 days hence." Defendant said " let us go now, we shall come on that day and have the matter settled." On the 24th defendant went with me to Kaliprosunno's again. Kali then said " you will have to wait about two days longer, my cashier is not here, when you come two days hence he will be, and I will settle and pay: the defendant and I came away." I said to defendant " the time is up and he is making me run in this way, I shall send an attorney's letter, and take legal steps, I cannot wait any longer. I will give an attorney's letter and take other steps." Defendant said " Kali is a great man and does not require being written to, I will have the matter settled." Two days after that I saw defendant, who said I did not promise to have the matter settled to-day, but, as the Dole Poojah is going on in Kali's house, I will settle it afterwards. I went to him again. He said I do not feel well, that is why I have not been to you. Go to Kaliprosunno's; I am unable to go; when you get there the matter will be settled; I went to defendant a day or two afterwards and said, "you asked me to go to Kaliprosunno; I have done so, but he has made no settlement, I came away and informed my employer." In cross-examination this witness said." The Dole Poojah went on at Kali's house about the 27th or 28th March. A day or two before the Dole defendant came to my house and said, a promise had been made to pay the money at that time, but the promise could not be kept, meaning Kaliprosunno's promise to pay in two days. I saw Kali after the Dole." He said, " bring defendant along with you, and I will pay the money." From this evidence of the plaintiff's witness, taking it for granted that it is all true, it appears to

me very clearly that both he and the defendant throughout the whole of the transaction as to which he speaks, were thinking only of how Kaliprosunno could be got to pay. There was no notice, either direct or indirect, to the defendant that he was himself to be held liable. When we turn to the defendant's evidence, the case is much stronger. He denies that most of the interviews spoken to by the Sircar ever took place, but he states, and this portion of his evidence at any rate I believe to be true, that when Kaliprosunno did not pay the bill, the plaintiff, through his sircar, applied to him to renew the bill, saying that no harm could come to him, and that the plaintiff would undertake, if he got a renewal, not to proceed against the defendant, but to proceed against Kaliprosunno only; when it is borne in mind that the bill which is the subject of this suit had been several times renewed, and when we consider the relative positions of the parties, and their conduct in relation to this bill, as admitted by the plaintiff's sircar, I do not doubt that the defendant's story as to the proposed renewal is correct. If so, it strongly confirms the view which I have taken of the plaintiff's case on his sircar's evidence. I therefore find that the defendant received no legal notice of dishonour, and that he is not now liable on this bill. The suit is dismissed with No 2, costs.

Dismissed accordingly.

ORHOYCHURN MULLICK *vs.* WOMESCHUNDER PAUL.

A Plaintiff will not be allowed to set up one case, and having proved another to ask for issues to be raised to suit the proof, but when a Plaint and its proof necessarily lead to one or more particular issues it is the duty of the Court if these issues do not come by surprise on the defendant, to raise such issues and to give the relief thereon to which the Plaintiff is entitled.

Newmarch for the Plaintiff.

Coryton for the Defendant.

Peterson, J.—This is a case of considerable importance as between execution creditors and mortgagees of land, for that reason I have thought it better to give a written judgment, in order that no mistake May 23, 1864.

might be made as to any point of the judgment, should the case be taken to the High Court on appeal. The plaintiffs allege that they are equitable mortgagees of a four annas share of a House No. 93 Baronussee Ghose's street belonging to the defendant, Womeshchunder Paul, who deposited the title deeds of the House in question, together with title deeds relating to other property, as a security for the repayment of Rs. 10,000 and interest at the rate of 36 per cent per annum. The plaintiff then goes on to allege that the Sheriff, J. P. Thomas, one of the defendants, had seized the premises in question at the suit of one Choneeloll Conorea; whose heir the defendant, Toolseedoss Conorea, was. On his putting in his written statement and the case being called on the 13th May, and it appearing that Choneeloll Conorea had made a will, and that his representative was Dadie Bohoo, the names of the sheriff, and of Toolsedoss Conorea were struck out as defendants, and Dadie Bohoo was made a defendant. The relief sought in the prayer of the plaint is curious, having regard to the substance of the plaint and the written statement of the plaintiff.

The defendant Dadie Bohoo in her written statement says she knows nothing of the equitable mortgage, and that the suit was unnecessary and ought to have been dismissed with costs. The case was called on for hearing on the 13th day of May; the plaintiff Obhoychurn Mullick gave evidence as to the execution of the instrument and the mode in which the consideration was paid. On looking at the instrument of deposit I found it insufficiently stamped, and imposed a penalty of twenty times the stamp together with the costs of the proper stamp, amounting in all to Rs. 735; on this being paid I admitted the document in evidence. After the examination of the plaintiff and after reading the written statement of the defendant, I suggested that I thought, under the circumstances, there was evidence of the existence of the deposit and the payment of the consideration, and that the plaintiff was entitled to a declaratory right under Section 15 of Act VIII of 1859, and that the only question was as to whether I should declare the right of giving the defendant her costs against the plaintiff, or simply make no order as to the costs. Counsel for the plaintiff then referred to the correspondence, upon which it appeared that from the first the plaintiff was ready and

willing to dismiss the suit with its necessary consequences, as soon as ever Dadie Bohoo, through her attorney, would admit the mortgage to be a valid one. He insisted that she was a necessary party and that her costs ought not to be given as against the plaintiff; on the other hand it was contended that she was an unnecessary party and that the bill must be dismissed, as against her, with costs. When the case was again called on Monday last, being under the impression that the consideration was not disputed, I expressed an opinion that I thought it unnecessary for the plaintiff to give further evidence as to the payment of the consideration money, as it was not disputed. *Mr. Coryton*, counsel, for the defendant, disputed this, and evidence was fully gone into on that day and also on the following, as to the consideration. Although a considerable suspicion arose in my mind during the cross-examination of the plaintiff, Obhoychurn Mullick, as to the *bona fides* of the transaction, on further evidence being given, I was fully satisfied of the consideration having been paid, the very notes and Government paper, with which it was paid, being traced into the hands of the defendant Womeshchunder Paul. The consideration, however, was fully contested throughout.

During the hearing I thought it necessary under Section 141 of Act VIII to raise two issues. *First.*—Is the plaintiff entitled as equitable mortgagee with deposit of title deeds, to a charge in the 4 annas share of Womeshchunder Paul in certain houses? *Second.*—Is the defendant, Dadie Bohoo, representative of Choonee Lall Conorea a judgment creditor of Womeshchunder Paul, and under which judgment some of the premises in question have been seized, a necessary or proper party to the suit? It was contended by Counsel for the defendant that the Court was exceeding its powers in setting up these issues on the plaint and prayer as they stood. I overruled the objection and my reason for so doing I give as follows. Although I should not allow a plaintiff to set up one case, and having proved another, to ask for issues to be raised to suit the proof, I consider that when a plaint and its proof necessarily lead to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues and to give the relief thereon to which the

plaintiff is entitled. In the present case the plaintiff sets out the facts by showing his title as equitable mortgagee to the seizure by the sheriff of the premises mortgaged at the suit of the Testator of the defendant Dadie Bohoo. Now had there been no prayer, I say that the only issues suggested would be those that I have raised, and still because the relief sought is such as to have no relation to the subject matter of the plaint, I am asked to dismiss this plaint with costs. Section 140 of Act VIII gives me the power to raise such issues as I have done. If I am proceeding *ultra vires* in raising the issues a Court of appeal must decide so. On the first issue I find for the plaintiff. Under Section 15 Act, VIII. of 1859 I should be entitled to make a declaratory decree without granting consequential relief. It is, however, unnecessary for me so to do, as I am in a position to grant substantive relief. On the 2nd issue I am of opinion that the plaintiff had a right under the circumstances to make the defendant Dadie Bohoo a party. It was clearly her interest, if she thought fit, to cut down the plaintiff's claim as much as possible. As a judgment creditor she could have redeemed the mortgage; she would then have been in the position of a mortgagee both as to her judgment debt, and the mortgage redeemed. The plaintiff had a right to come in and ask for a declaratory decree as to his right as a mortgagee, as against the mortgagor, and foreclose him. Surely if the mortgagor's interest in the equity of redemption had been seized and sold, he could have brought his suit against the owner of the equity of redemption, calling on him to redeem or be foreclosed; then on the same principle I cannot see why under the circumstances he could not do it against the judgment creditor, who has seized but not sold If the defendant Dadie Bohoo has been unnecessarily brought before the Court, she has to thank her legal advisers for being so. She had full opportunity, by admitting the mortgage debt, to have the bill dismissed against her and her costs paid. Her legal advisers did not allow her to avail herself of those opportunities, but compelled the plaintiff to come into Court, to prove his mortgage. If any thing could convince me of the defendant Dadie Bohoo being a necessary party, it would be the defence raised by her in hotly contesting every item of the consideration. She had an interest in putting down the claim of

the plaintiff and she ought to have proved this interest. She has failed in so doing, and she must stand the consequence. According to the cases decided in England, the plaintiff might have made her a party. She would then have been entitled to come in and redeem on the usual terms. Under Act VIII Section 73, I could have made her a party, and under the circumstances I should have made her a party.

Decree.—Declare and decree, that plaintiffs are entitled as equitable mortgagees, to a charge on the properties mentioned in the memorandum of deposit to the amount of principal, interest, and costs, except the stamps.

That defendant, Dadie Bohoo, is entitled to redeem that mortgage, defendant's interest, and costs of the 1st plaintiff, and that on so redeeming, she be entitled to add her own costs, and stand in the place of the said plaintiffs.

Decree that an account be taken of principal, interest, and costs due to the plaintiff, or to the said Dadie Bohoo, should she redeem the plaintiff, and a day given for sale or foreclosure of the said premises in default of payment. Costs No. 2.

In the matter of the claim of Dadie Bibee.

DEBNARAIN BOSE *vs.* A. S. LEISK.

To constitute a lien on any property there must be a clear agreement for the specific appropriation of the property, and further the property must be in the possession of the party who claims the lien.

Newmarch for the plaintiff.

Graham with *Lowe* for the claimant. June 8, 1864.

The defendant was unrepresented.

The claimant in this case put forward her right to a lien on the stock-in-trade, goods and chattels, and the outstanding bills of the defendant, as the widow and executrix of Chooneeloll Conoreah, the late banian of the defendant, for the balance of an unsettled account stated in the claim filed, to amount to Rs. 30,000 or thereabout. If the

claim were allowed, and the lien established, its effect would be to defeat the plaintiff, who was an execution creditor of the defendant under decree for Rs. 2,108 and costs, and who caused the Sheriff to seize the stock and effects of the defendants under that decree.

It appeared from the direct examination of the defendant Leisk, that he carried on business in this city, under the style and firm of A. S. Leisk and Company; that on the 25th July 1862, he appointed one Kenaram Bannerjee his banian, and by an agreement entered into on that date, the terms of the banianship were settled. By that agreement it was provided that Kenaram should advance to the defendant Rs. 10,000, and as security for that sum, and interest at the rate of 11 per cent. per annum, the defendant assigned and transferred to his banian the whole of the stock-in-trade and goods *which were then* in the godowns; and it was agreed that Kenaram should from time to time further advance to the defendant, if required, sums not exceeding Rs. 2,000 as floating deposit. That the stock-in-trade and goods so assigned were to be exposed for sale under the charge of Kenaram, and the keys of the godowns and ware-house in which such goods should be stored, were *always to remain in the possession or custody of Kenaram or persons authorized by him.* That bills and vouchers when made out should be delivered to Kenaram, who should collect the amounts, and no duplicate bills should be issued without Kenaram's consent, and that all monies to be received by Kenaram on account of sales, should be accounted for to the defendant. The 7th Clause of the agreement provided that the collections were to be deposited in the Bank of Calcutta or in a chest in the office, the key of which was to be kept by the banian, and in case of the stock-in-trade falling insufficient in the judgment of Kenaram, he was to be at liberty to realize what was due to himself and enter up judgment on a bond collateral with this agreement, for the residue. The 17th Clause provided in express terms that the banian was allowed a lien on the whole of the stock-in-trade of the said firm *as aforesaid,* and the bills and vouchers or any other documents or security which should be placed in his hands. The defendant Leisk in his direct examination continued to state that he commenced his business with Kenaram on the above footing as a ship-chandler and sail-

maker in July 1862, and the Rs. 10,000 was paid on his account by his banian who kept the keys and placed his own durwans in charge of the godowns. That Kenaram continued to act as his banian down to the middle of 1863, when being desirous to terminate the engagement, Chooneeloll Conoreah became the banian in his place in the month of June in that year. The defendant said that at this date he owed Kenaram Rs. 15,000; that Chooneeloll agreed to pay him off and gave the defendant a cheque for Rs. 12,000 which he endorsed over to Kenaram, and on the bond from the defendant to Kenaram there appeared the following receipt "Calcutta 25th June 1863, received from Messrs. A. S. Leisk & Co., Rs. 12,000 in part of my claim upon the within bond and agreement dated the 25th July 1862, and have made over possession of the stock-in-trade and outstanding bills to Chooneeloll Conoreah, (signed) Kenaram." The defendant went on to say that no bond or deed of assignment was executed in favor of Chooneeloll upon his becoming such banian, but drafts as well as an agreement were prepared in Mr. Carapiet's Office, which have been given in evidence. He stated that Kenaram, by his attorney, Mr. Downing, gave over possession in defendant's presence to Chooneeloll. This was corroborated by Mr. Downing who was examined on the trial of this issue, and on re-examination, he stated that Conoreah handed over to the defendant the keys, and told him to look after his interests. The defendant said that Chooneeloll placed his durwans in charge, and they have not since been removed. That a bill collector had collected the outstandings on Chooneeloll's behalf. That Chooneeloll made further advances to his firm amounting in all, from the date of his becoming banian, down to the 29th August, to the sum of 26,310-2-6, including the 12,000 already mentioned.

Chooneeloll died on the 1st of September 1863, and the defendant said that Toolseeram advanced the 3,000 to pay off Kenaram the balance due to him. He went on to say that Toolseeram acted as the banian in the place of the father, but Mr. Carapiet, his Attorney, who has been examined, stated that this was not so. However, little could turn on this discrepancy, as from the evidence he did not appear to have done more than to have taken his seat in the office. Mr. Leisk went on to

say that he was in treaty for another banian, and had agreed to pay off Chooneeloll by paying down 6,000, and the residue in instalments within 2 years, when the seizure which gave rise to the trial of this issue was made on his effects, and put an end to the business. He stated that at the time of seizure, the invoice price of the stock in hand, was about 15,000, but if sold by public auction, they would not realize more than about 3,000.

On cross-examination, the defendant stated, that the assignment in favor of Chooneeloll was not perfected owing to the objections of his partner, Mr. Bremner, who withdrew from the business. That he was doing a brisk business down to Chooneeloll's death ; that new goods came in and old goods went out, but he has no stock book to shew the details. That Debnarain, the plaintiff, under this seizure sold him his goods in August, which now form part of the stock in hand. That he could not tell what goods came in since June, or the amount of the purchases. That he kept the keys of the godowns, and paid the two Durwans left by Conoreah. That he, the defendant, carried on the business, sold the goods, and directed the coolies to carry them away, that he kept the keys of the godowns at night, that the goods were entirely at his disposal, and that when goods went out, he handed the bills made out to Conoreah in substitution. That he was well known in the bazar, that he had a banian, but there was nothing to show strangers that he Leisk was not absolute master. That after Conoreah's death, the business continued to be carried on. He also said the claimant, Dadie Bebee, Conoreah's widow, did not come to the office, but her son took his seat there, and things went on as before.

The defendant on further examination, stated that since Conoreah's death, he had sold the goods, received the money, and paid debts and applied the proceeds as he liked, and the bills and vouchers remained in his possession.

Levinge, J.—It is on the above evidence that the Court is asked to declare the right of the claimant to a lien which, if established, must defeat the execution made on the stock-in-trade by the judgment creditor, it being settled law that goods while they continue in the possession of

a person entitled to a lien, cannot be seized in execution for the real owners' debt. Of course if there is nothing due on the balance of account between the defendant and the representative of Conoreah, there can exist no pretence for a lien ; but from the evidence and the mode in which it appears that the defendant kept his accounts, it is difficult for the Court to say on the trial of this issue with any certainty what is the true state of the account. However I am relieved from the necessity of making any finding on that matter, as I am of opinion, having regard to the evidence in the case, and the law relating to the subject of lien, that the claimant cannot sustain her right to the lien set up.

The claim put forward in this case is the right to a general lien over the stock in trade in respect of a general balance of account, but such a claim, having clearly a tendency to prefer one creditor above another, has never been favoured in law, on the contrary, it is taken strictly. The first step to establish a lien is to show possession of the subject matter in the person setting it up, for it cannot be said that a person has a lien, which is a right to *retain* the goods, when he has no possession. To constitute a lien on any property, there must be a clear agreement for the specific appropriation of the property, and further there can be no lien upon any property unless it is in the possession of the party, who claims the lien, see *Shaw vs. Weale* 27 *L. J*, *Ch.* 444. Now upon the evidence it is impossible that I can find a possession in the claimant of this stock in trade. Kenaram had no doubt originally a lien on the stock in trade in the godowns at the time he entered into the agreement of the 25th July 1862, but that was of the stock in trade then in the godowns, and as that agreement does not provide for a lien on future goods to be brought in, so the claimant can gain no advantage from being the representative of the assignee of that agreement. But even if it had contained such a provision, it would have been only an agreement to give a lien, actual possession would have been necessary to constitute that lien, and that possession would have to have been proved.

Supposing the agreement and assignment which was never executed,

delivered to Conoreah on his becoming banian, had contained the same provisions as those set forth in the agreement with Kenaram, and possession had actually been taken and continued by Conoreah, that would have been lost on his death and should have been revived by some distinct act of making over possession to his widow or son. But the evidence in this case, shews that Conoreah in truth was not in possession of these goods for some time before his death. His very first act was that of abandonment of possession, apparently having perfect confidence in Leisk, for according to the defendant's evidence, Conoreah handed over to him the keys and told him to look after his interests. This evidence, and that which I shall again glance at, completely nullifies any attempt to establish a possession through the two durwans paid by Leisk, who merely took care of the goods as they came in and went out. The defendant Leisk has stated in his evidence that during Conoreah's life-time "he kept the keys of the godowns, and paid the two durwans left by Conoreah, that he the defendant carried on the business, sold the goods, and directed the coolies to carry them away, that he kept the keys of the godowns at night, that the *goods were entirely at his disposal*, and that when the goods went out, he handed the bills made out to Conoreah in substitution; that it was well known in the bazar that he had a banian; but there was nothing to show strangers that he, Leisk, *was not the absolute owner*," and when we look at the evidence to see what possession is to be traced in the claimant, we find the defendant Leisk deposing as follows—" that since Conoreah's death he has sold the goods, received the money, and paid debts, and applied the proceeds *as he* liked, and the bills and vouchers remained in his possession."

I have no doubt it was not thought necessary to give possession to either the claimant or the son after Conoreah's death, and that they were satisfied with the agreement to take Rs. 3,000, and the residue of the debt to be paid by instalments in two years, and here I may observe that the effect of this agreement would be to destroy the pre-existing lien had such in point of fact existed. See *Pinnock vs. Harrison* 3 *M. and W.* 539 *per Anderson B.* To hold that there

was a right of lien in this case, would be to rule that any banian in Calcutta who advances money to a trader for the purpose of keeping him afloat in his speculations would have a right to defeat the creditors who have supplied the very goods by which the trade is carried on, and would be legalizing a trap to catch persons who supplied goods on the faith that the person who obtained them was the person to whom the supplier had a reasonable right to look for payment, seeing that he was the ostensible trader and owner of a large stock in hand.

I pass no observations on the system of trading pursued by Mr. Leisk as any remarks on that subject would be wholly beside the issue, I have to decide. The matter will be more properly dealt with in bankruptcy when his dealings as a trader will be before the Bankrupt Court, where the claimant in this case will rank among the other creditors. As I cannot treat this case as a mortgage, no mortgage existing, and as no possession is to be found in the claimant sufficient in my opinion to support a lien, I must dismiss the claim with costs to be taxed on Scale No. 2, to be realized out of the stock under seizure exempting the claimant from paying the same, but the claimant must pay her own costs.

IN THE MATTER OF THE BARQUE ANNE.

The Master of a Ship has by Statute (Act I of 1859, Section 58) a lien upon the ship for the recovery of wages due.

January 26, 1865.

This was an application for a warrant to arrest the Barque "Anne" lying in the River off Sulkea Salt Ghat on account of certain wages due to the Master.

Hyde for the Master produced the affidavit signed by the Master, and setting forth the principal facts of the case. It appeared that the promovent, Mr. Barker, had served on board the ship from the 1st of March till the 15th September last at a monthly salary of 425 Rupees. A portion of this salary had been paid, but 1,164 Rupees still remained

due. It was further stated that the cargo was shipped, and that the vessel was ready for sea.

Phear, J., asked whether the Clause of the Merchant Shipping Act which gave Masters the same remedies for the recovery of their wages as seamen engaged at Common Law, had been extended to India.

Hyde said that the Act had been re-enacted in India under the title of Act I of 1859. Sec. 58 of that Act was as follows :—" Every Master of a ship shall, so far as the case permits, have the same rights, and has remedies for the recovery of his wages, which by this Act or by any law or custom any seaman not being a Master has for the recovery to his wages."

Phear, J., said it was clear the Master had a right to the redress asked for. The warrant to arrest might issue.

Ordered accordingly.

HECKFORD *vs.* GALSTIN.

A letter is written by order of the Manager of a firm reflecting upon the character of a professional man, and signed by him, and handed over to a clerk to copy in the ordinary way in the office copy letter book which is open to all the members of the firm. Held that such instructions to copy amount to publication.

Pittar with *Newmarch* for the plaintiff.

Marshall with *Eglinton* for the defendant.

This was an action for libel. There was a 2nd count for slander, and a 3rd for an assault. The facts of the case will appear from the subjoined evidence and from the judgment. **December 19, 1864.**

The plaintiff stated that he was a Surveyor of ships for several Insurance Offices, among others for the Liverpool Albion, the Bengal Marine, the British and Foreign, and the North China. On the 26th of May last,

he was applied to by the defendant, on behalf of Messrs. Gregory and Co., agents for the Calcutta Steam Ship Company, who had purchased the ship *Lord Clyde*, formerly called the *West Wind*, to survey the ship and report upon her. On the following day he made his inspection and wrote to the defendant stating that he should recommend the removal of a portion of her ballast in order to get a better view of her kelson, and that some of the ship's ceiling should be removed in order to allow of an inspection of the outer planking from inside, and of the ship's timbers, concluding by observing that as she was not classed at Lloyd's or Veritas, he recommended this further inspection before he could say that she was fit to carry a dry or perishable cargo. These recommendations of the plaintiff were not, however, carried out, and the ship went to sea with a cargo of grain and rice, among other things, bound for Colombo. When off the Sand Heads she sprung a leak and put back to Calcutta in four or five days: she then was obliged to go into Mr. McNicholl's dock for repairs. It appeared that the ship was really classed in Veritas for 1864. The plaintiff continued as follows—"I had only referred to the lists for 1861 and 1863. The defendant showed me her name in the list for 1864, and asked me to modify my written opinion about the ship; this I refused. When the ship was in dock I went to see her. The defendant was there, and asked me what I came for? I said I had come to look at the ship as I came to see every ship." This was on the 8th of August. I had before that received a letter from the defendant (the libel complained of). The defendant said it was his dock, and if I did not go out of it he would turn me out. I said "It is Mr. McNicholl's dock, when he tells me to go, I will go." Defendant took me by the collar and said he would see if he would not turn me out. I asked him if he knew what he was doing? He said I should not come there to give a false report on his ship and tell d—d lies about her. I said "you durst not repeat those words in the presence of a third party." He said he would, and after walking up the side of the docks he said in the presence of Captain Littlepago and Captain Adley "you are a liar, a d—d liar and come here to give a false report of the ship." I afterwards instructed my attorneys to ask for an apology. My average income

is Rs. 1,400 a month. The defendant is, I believe, in large business as a merchant. His Attorneys wrote in reply to my letter to say that they would accept service of process."

On cross-examination the plaintiff admitted that the want of a class in Lloyds or Veritas materially affected a ship's character for the purposes of insurance, but added that the class the *Lord Clyde* possessed in Veritas was one that limited her voyages between the West coast of Africa and the East coast of America, and was not such a one as would induce him to change his opinion about the ship without himself making a closer inspection. He said he was requested by Mr. De Sousa also, to alter his written opinion, but he refused to do so. When in the dock on the 8th of August he did not attempt to touch the ship; he was eight or nine feet from her, and had nothing but a walking stick with him. It was his duty to keep Insurance Offices informed of the state of all ships.

Mr. Galstin was called by the defendant and admitted writing the letter, the subject of the libel; it was copied by a clerk into the book of copied letters, by a copying machine, and the copy lay in the office. It was as follows:—

4th August 1864, Calcutta, Calcutta Ship Company "Limited."

N. Heckford Esq.

SIR,—We beg to return to you the Bill for special survey and report on the *Lord Clyde*, and beg to say that as the report was untrue, and false, and wilfully so, we must decline to pay the fees.

Yours faithfully,

M. GREGORY AND CO,

Secretaries.

The witness also admitted that he called the plaintiff "a liar, a d—d liar, and asserted that he published false reports about ships," in the presence of Captain Littlepage and Captain Adley. He denied the assault.

Marshall, on behalf of the defendant, objected to the count for libel on the grounds,—(1) That there was no evidence of publication, and (2) That the communication was privileged. These objections were, how-

ever, overruled by the Court. The learned counsel then contended that the publication was of a very limited nature—in fact a mere technical one—and nothing need have come of it but for the plaintiff himself noising it abroad. As to the slander—the plaintiff himself invited the repetition of the words, and there was some foundation for the defendant's conduct, as the plaintiff had made a false statement in saying the ship was not classed. As to the assault there was none—even in law.

The defendant was then recalled as a witness on his own behalf, and stoutly denied having committed any assault on the plaintiff, and in this he was corroborated by Captain Adley, who also stated that he had made a survey of the ship and considered her fit to go to sea.

Captain Durham was called, and he stated that in his opinion as the ship had a class at Veritas it was not necessary to re-survey her; she started one of the planks of her starboard streaks at the Sandheads, before she put back.

Pittar replied.

Levinge, J.—In this action, so far as the count for libel is concerned, there has been made only a technical defence. On a point of law as far as the count for slander is concerned there is no defence, for the defendant admits himself that he made use of the words complained of in the presence of third parties, but as far as the count for assault is concerned, there is a direct denial. It appears that on the 26th of May, the defendant wrote to the plaintiff telling him that the Company had bought the *Lord Clyde,* and requesting him to go on board her and survey her for the purposes of insurance, as he says in his evidence. The plaintiff accordingly went on board the ship, and after a partial inspection, wrote what is called a report, but what, in fact, is no report at all, but only a series of recommendations, concluding by saying that as the ship had no class at Lloyd's or Veritas, he should recommend a further survey.

Captain Durham sees no necessity for a report at all. But that is not the ground the defendant takes. I am of opinion that no report has

simply an order that each party should state what he knew of his own case; and it was not necessary for that purpose that he should see the documents upon which the opposite side relied. Mr. Justice Peterson and himself were agreed upon the order which he was about to make, namely, that the defendant should furnish a list four days after notice to him of the plaintiff having filed his written statement.

Order accordingly.

Pole *vs.* Gordon.

Effect of the insolvency of an agent upon contracts made by him with third parties on behalf of an undisclosed principal.

Goodeve with *Eglinton* and *Woodroffe*, for Plaintiff.

The *Advocate General* with *Newmarch*, for Defendant.

Evans for the Official Assignee.

This was a suit to foreclose a mortgage of Rs. 50,000 secured on some silk factories belonging to defendant. The Bill alleged that the plaintiff had entered into a contract through Messrs. Tulloh and Co., whereby the defendants were to supply the plaintiff with silk for two years. The contract on the face of it purported to be made on behalf of Messrs. Tulloh and Co.'s London correspondents, but the name of the plaintiff as principal was not disclosed. In accordance with the terms of the contract, the plaintiff advanced the defendant Rs, 50,000. Before the two years had expired Messrs. Tulloh and Co., became insolvent and the plaintiff now sought to foreclose the mortgage by which the Rs. 50,000 were secured, alleging that the Insolvency of Messrs. Tulloh and Co., had put an end to the contract. The Bill also alleged charges of fraud, but they were abandoned at the hearing.

Feb. 25th. 1864.

Leavinge J.—The plaintiffs, in this suit, are London merchants and carry on business under the name of Van Notten & Co. The principal defendants are the representatives of the firm of Carr, Tagore & Co., who were the owners of the Comercally Silk Factories at Jessore.

This Bill was filed in 1843, on the alleged termination of a contract dated the 14th December 1844, entered into by the firm of Tulloh & Co., of Calcutta, with Carr, Tagore & Co., through the medium of Hickey, Bailey & Co., Brokers in Calcutta, to foreclose a mortgage of Rupees 50,000, secured on the Silk Factories of the defendants. The contract was taken by Tulloh & Co., for the plaintiffs, without disclosing their names as principals, but purports, on its face, to be made on behalf of their London correspondents. The object of

the contract was to secure for the plaintiffs, silk of a particular kind manufactured by the defendants for a period of two years, to commence with the March bund of 1845, and to continue in force until the March bund of 1847 inclusive.

It was one of the terms of the contract, that the plaintiffs were to advance the sum of Rupees 50,000, to be secured by a mortgage of the stock and works for the full period of the contract. The 6th clause of the contract provides that the silk was to be delivered in Calcutta to Tulloh & Co., and to be paid for on delivery. It seems that several consignments were made under the contract, and that they continued down to the month of May 1846. The plaintiffs allege that some of the shipments made prior to May 1846, proved defective, and there is no doubt that complaints reached Carr, Tagore & Co., as they allude to them in a letter, dated the 24th April 1864. A mass of evidence, touching the inferiority of this silk, has been taken under the commission ; but as the charges of fraud have been abandoned, I do not see that it would be competent to the plaintiffs to rely on a breach of the contract as to these shipments, inasmuch as their agents took delivery, and accepted these consignments as coming up to the terms of the contract; and they could not, in the absence of collusion and fraud, now raise any objection to the quality of the silk. It is evident that it was one of the chief objects of this contract, to guard against the uncertainty that might result from an examination in London, or wherever the plaintiffs should advise these shipments to be consigned, and to stipulate that any questions, as to rejection or inequalities, should be pointed out, and dealt with, in Calcutta, and not elsewhere. On the 20th May 1846, Tulloh & Co., became bankrupts, and the plaintiffs contend that their bankruptcy put an end to the contract. It is from this date, and from the circumstances flowing from their failure ; that this protracted and expensive litigation has arisen. The Bill charges the defendants with fraud in carrying out the contract, and insists that it thereby became vitiated, but these charges have been abandoned, and the argument in favour of the determination of the contract, rests solely on what the Court will consider to be the effect of the Insolvency of Tulloh & Co.

The object of the suit, is to recover the advance of Rs. 50,000 with interest, and to have it raised off the mortgaged property. The first defence relied on is, that the Bill should be dismissed, as the contract was not terminated by the Insolvency of Tulloh & Co., and consequently that the mortgage could not be called in; the other defence is, supposing the Court should be of opinion that the contract was terminated by that event, that the defendants have a right of retainer, or set off, which will cover the amount of advances.

The plaintiffs, by letter dated the 24th February 1845, authorized Tulloh & Co. to make the advance in full. This was accomplished, and the mortgage referred to in the pleadings, was the result. Considerable comment has been made on the precise meaning of the 11th paragraph of the contract, which treats of the subject of the advances. It must be admitted that the clause is obscurely worded: possibly, so much care was not bestowed on the composition of this paragraph, as the concluding sentence of the contract shows that the question of advances was to remain an open one. The plaintiffs contend, that the advances were made for securing the carrying out of the contract, by supplying funds to work the factory, and so to enable the defendants to supply the whole of the silk, of the particular kind stipulated for; whereas the defendants have contended, and Mr. Gordon has stated in his evidence, that these advances were made not only with that object, but also for paying the defendants for the silk when ready to be delivered, and certainly the recital in the mortgage would give colour to that position, inasmuch as it recites that it had been agreed by the parties to the contract that Tulloh & Co. were to lend and advance, from time to time, such sums as the defendants should require, " the said sum so to be advanced, to be deemed and taken as payment in advance of the price of the silk so contracted for as aforesaid", and the body of the deed carries out the terms of that recital. There has also been given in evidence, a certain declaration of trust which is to be found referred to in the 68th folio of the *Bill*, and dated the 13th June 1345, but I find that it does not mention for what purpose this mortgage was given. I allude to this, as Counsel for plaintiffs stated the declaration of trust came round to the terms of the

contract. However, I am of opinion that the defendants could have had no right to resort to the advances to pay for the silk supplied under the contract, and that such is the meaning of the 11th Clause, construed by reference to the 6th, which speaks of payment for every parcel on delivery in Calcutta, and it appears to me, that such was the construction put on the contract by the parties, as Tulloh & Co. were in the habit of paying upon delivery, nor has there been any evidence given of any further advances, *quâ* advances made by plaintiffs or their agents, beyond the one bulk sum, Rupees 50,000. They, the plaintiffs, kept Tulloh and Co. in funds, from time to time, to pay for the silk on delivery, but not to supply, or keep up the Rupees 50,000 already advanced, and the parties never treated that fund as one to be drawn on and exhausted, by payments for delivery of silk. This view is material, when I discuss the payment made by Tulloh & Co., for the 16 bales just prior to their bankruptcy.

The defendants delivered to Tulloh & Co. 16 bales of silk on the 9th day of May 1846, and took for that delivery Tulloh & Co.'s bill for Rupees 18,024, payable 10 days after date. This is admitted by Mr. Gordon in his evidence. This bill the defendants discounted, but on the 20th May, Tulloh & Co. became Bankrupts, and the amount was lost to the defendants, and they contend that they have a right to credit out of the Rupees 50,000 for this sum, and on two grounds— firstly, that they had paid themselves out of the Rupees 50,000 before delivery, and that the giving of the note was only a replenishment of the Rs. 50,000, but I have shewn that in my opinion such was not the contract, nor does the evidence support that position; secondly, it is contended that the receipt of this bill did not amount to payment for the silk.

I think that the defendants cannot resort to, or claim a set off, against the Rupees 50,000 for the price of the 16 bales for which they took the bill in question. They were bound to take payment for the silk on delivery.

The 6th Clause states, that the silk was to be paid for on delivery; if not, the defendants might sell it, and charge the difference between

what was realized, and the contract rate, against the plaintiffs. Therefore the defendants, elected to depart from the terms of the contract, abandoned their right of selling, and took a bill from the Agents, and it is to be observed that no evidence has been read to the Court, showing that a cash payment was refused to the defendants. They must be deemed to have taken the bill as payment under the words of the contract, and they therefore took, and held it at their peril. It is clear that the defendants could have got paid for the silk, if not in cash, by reason of Tulloh & Co.'s impending Insolvency, by disposing of it in the Calcutta market under the 6th Clause ; so to hold that this bill was not a payment, would be to place the plaintiff in an unfair position. Mr. Pole has sworn that his firm kept Tulloh & Co, in funds to meet the deliveries; and that they should have had, at the time of their failure, £10,000 to the plaintiffs' credit. By Tulloh & Co's. Bankruptcy, they lose these advances, which should have gone to pay the defendants under the contract; and if they are now liable to pay for the 16 bales, virtually they would have to pay twice over. Whereas the defendants have only themselves to blame for departing from the terms of the contract, under which they could either have obtained payment from Tulloh & Co., or sold in the market.

Apart from the express conditions of this contract, the *onus* would be on the defendants to show that at the time they took the bill, they could not obtain payment in any other way. The law is settled on this subject : the principal is discharged, if the creditor, having it in his power to obtain payment in cash, elects to take the Agent's bill. See *Strong* vs. *Hart* 6 B and C, 160, and the later case of *Bobinson* vs *Read,* 9 B and C, 449. The evidence is, that plaintiffs kept their Agent in funds; therefore it may be presumed, in the absence of evidence to the contrary, that this bill was taken by choice, and being so, was equivalent to payment; see Parke, J.'s words in *Robinson* vs. *Read,* p. 455. But if the impending Insolvency of Tulloh and Co. drove them to pay the bill, it was taken at the choice or option of the defendants, and would still have to be treated as payment, inasmuch as the contract points out what course the defendants were to pursue, in case they did not receive payment. The defendants knew that

Tulloh and Co. were agents in the matter; and they knew, as appears by a letter among the defendant's exhibits, dated the 24th April 1846, that Van Notten and Co. were the principals, and therefore that Tulloh and Co. had no power to waive the provisions of the contract. If it could be permitted, as urged by Mr. Goodeve, to allow a bill payable at 10 days after the date of the delivery, to be given by the agents as a payment within the scope of their authority, and the terms of the contract, so might one be given for 50 days, and thus the plaintiff would be exposed to the hazards of Bankruptcy, and the other contingencies that might arise in the firm of Tulloh and Co. I do not forget the case of *Campbell vs. Hassel* 1 Starkie 233, cited by the plaintiffs' Counsel, as showing that an Agent has no power to make a payment varying from the original terms of the contract.

The plaintiffs have given up the charges of fraud made in the bill, and have taken their stand on the fact of the Bankruptcy alone, as determining the contract. If the contract was not terminated by the failure of Tulloh and Co., it is clear that this bill must be dismissed, inasmuch as the mortgage was to remain in full force, until the completion of the contract. I have given full consideration to this case, and have come to the conclusion, that this bill must be dismissed. That being my Judgment, I might have rested content with giving my reasons for the dismissal of the suit, without going into the arguments addressed to the Court on the subject of the payment by the bill, and the claims of the defendants to a set off for the silk shipped subsequent to Tulloh and Co.'s Bankruptcy. But I have considered it right to do so, inasmuch as if the parties, on due consideration, shall be satisfied with my Judgment, a settlement may be come to, which will prevent further litigation. The following are the principal reasons adduced by the plaintiffs' Counsel, why the Bankruptcy terminated the contract, *viz.*, that this particular contract could not go on without the agency of Tulloh and Co. as the existence of the firm, *quâ* firm, was essential to its continuance; that the contract shows that the personal judgment and supervision of Tulloh and Co. was necessary; that a house or firm in Calcutta, was expressly stipulated for, to take delivery, and do all things requisite, and that, inasmuch

as no stipulation was provided in the event of the firm, the contract fairly collapsed.

Admitting for the sake of argument, that the Bankruptcy of Tulloh and Co. terminated their powers to act as agents, it by no means follows, that the contract between the plaintiffs and the defendants, must fall to the ground. I do not see why the death or Bankruptcy of an agent, is to dissolve a contract. No doubt there may be cases, in which the performance of a contract may become impossible by the happening of some event, and then performance will be excused; but the impossibility must be very clearly established; and I have been unable to find any case, showing that the death of an agent, much less his bankruptcy, will render the continuance of a contract impossible. I apprehend there are abundance of reasons to be given in this particular case, why the contract did not become incapable of being performed, and therefore was not extinguished. It was perfectly competent to the plaintiffs, to have appointed another agent to do for them all that was required, by the contract; and should Carr, Tagore and Co., have repudiated that appointment, they would, in my opinion, be liable in damages to make good the value of any silk they failed to supply. Why are the defendants to suffer, and have the contract terminated, because the plaintiffs did not stipulate for a successor, or neglected to provide one? I am not to be understood as saying, that the powers of Tulloh & Co. ceased for every purpose as agents under the contract, by reason of their Bankruptcy. There are many acts and duties, which it has been held, an Agent may perform under his appointment, subsequent to his Bankruptcy; certainly, in this case, it does not lie with the defendants to say, that Tulloh & Co. were capable of doing all things that were to be performed under the contract, as they repudiated their agency by shipping direct to London the consignments of silk subsequent to their failure.

If Tulloh and Co. were principals, and not agents, the fact of their being adjudicated Bankrupts would not have put an end to the contract, how then can it be said, that being merely agents, a *fiat* in Bankruptcy annulled the contract? If by the bankruptcy, Tulloh and

Co. became incapable of exercising any of the functions required by the contract, which I do not admit, the defendants are not to be cast adrift, and the advances called in, simply because the plaintiffs did not provide for that contingency. Again, suppose Tulloh and Co. refused to take delivery of every bale produced to the end of the March bund 1847, or refused to pay for them when tendered, the most practical way of attempting to stifle this contract, would that have terminated it? I think not. The defendant had the right to sell, bale after bale, to a stranger, and hold the plaintiff responsible for loss. The defendants terminated their duty on tendering the bales in Calcutta, and for any miscarriage on the plaintiffs or their agents part, subsequent to the fulfilment of the defendants' duty, they ought not to suffer. If, notwithstanding the bankruptcy, the firm, or their assignees, should have found funds to continue the agency, could Carr, Tagore and Co. say, we will not deliver, the contract is at an end, because Tulloh and Co. have been adjudicated Bankrupts? I apprehend not.

I believe that the idea of evading this contract on the ground of Tulloh and Co's failure never existed, until a considerable period after the bankruptcy; then several charges of fraud were made, to aid the plaintiffs in their attempts to cancel the contract, or call in the advances. I do not mean to say that there was any waiver of the right of the plaintiffs, to raise such a contention, inasmuch as they did not take delivery of any consignments subsequent to the Insolvency; but it is clear from the plaintiffs' letters of the 1st and 24th August 1864, that they did not then treat the contract as at an end, although aware of the failure of Tulloh and Co. They cannot, therefore, be presumed to have contemplated, when they entered into the contract, that the bankruptcy of the firm, would terminate the contract; if they did, they should have stipulated for it. When a person, by his own act, has created a duty or obligation, he must perform it, or make it good, as he might have provided in the contract for the very contingency by which he tries to escape.

There is the other matter about which we have heard much in this case, and as to which a mass of evidence has been taken in London

under the commission. I allude to the shipments made by defendants subsequent to the bankruptcy of Tulloh and Co. As I have held that the contract was not terminated by the failure of that firm, it follows, that as the contract stipulated for a delivery to the plaintiffs' Agents in Calcutta, there was no power, without the plaintiffs' authority, to ship to London, and I am of opinion that the defendants could not compel an acceptance in London. It is a clear departure from the contract, and the consignments I consider not binding on the plaintiffs. The defendants holding to the continuance of the contract, cannot depart from its conditions and therefore could not force the plaintiffs to take delivery in London. But it is more than probable that the plaintiffs would have no remedy against the defendants for this breach of the contract, as they declined the goods when tendered in London on the ground that the contract was at an end.

This has been an unfortunate litigation for all parties. I say this, assuming my judgment to be right in law, for it appears to me, that the plaintiffs instituted legal proceedings when they had no ground so to do; that at the time they did so, the full sum of Rs. 50,000 remained to their credit under the mortgage, which had another year to run before it could be called in, and the defendants had no claim against them for the dishonored bill for Rs. 18,624 or for the subsequent shipments.

I hope all litigation may be terminated by an equitable adjustment, the charges of fraud being abandoned. I dismiss this bill the several defendants to be paid their costs.

Appeal.

POLE *vs.* GORDON.

Eglinton, with *Evans* for the Appellant.

The Advocate General, with *Marshall* for the Respondent.

The following were the grounds of appeal as set out in the memorandum of appeal filed.

First.—For that the said Judge ought to have declared and found, that the contract in the bought and sold notes in the pleadings mentioned, was wholly rescinded and put an end to from and after the 16th day of May 1846. Dec., 23rd 1865.

Second.—For that the said Judge having found, and that rightly, that there was due to the plaintiffs, appellants, at the time of their filing their Bill of Complaint in this suit the full sum of Rs. 50,000 under the deed of mortgage of the 27th May 1845 in the pleadings mentioned, and that the defendants (mortgagors) could not resort to, or claim a set off or retainer against the said sum of Rs. 50,000 for the price of the 16 bales of Silk for which they received the bill of Exchange of Messieurs Tulloh and Company Rs. 18,024 on the 9th day of May 1846 as in the pleadings mentioned, or for the price of any silk shipped to London subsequent to the failure of the said firm of Messrs. Tulloh and Company, should have decreed payment of the sum of Rs, 50,000 so remaining as offered, together with interest thereon at the rate of 6 per cent per annum to the plaintiffs by a short day to be appointed by the said Court of first instance, and in default of such payment, should have directed the sale of the said mortgages, premises, and others, the reliefs on that behalf sought by the plaintiffs (appellants), in the said Bill of Complaint.

Third.—For that the said Judge was in error in holding that at the time of the institution of this suit upon the footing of the aforementioned deed of mortgage, the said deed had another year to run before it could be called in, and in dismissing the plaintiff's said Bill of Complaint in consequence of such erroneous finding in fact.

Fourth.—For that the plaintiff's said Bill of Complaint should not have been dismissed with costs.

Norman C. J.—The bill states that the complainants in, and prior to 1844, carried on business in London by their then name Van Notten & Co. That the defendant, D. M. Gordon,

in December of that year, was possessed of the Comercolly silk filature and factory, in trust for Carr, Tagore and Company, which firm is now represented by himself and others of the defendants. That the firm of Carr, Tagore and Company worked the factory on a small scale to the extent of 400 or 200 bales yearly, and not more, on an average of two years. That the silk so manufactured had always been marked Comeercolly F.J.D., and R.O.N.J.A.M.,which marks had acquired a great reputation in the London market, and was sold at an average price of 19*s*, 6*d.* per pound. That the complainants being desirous of purchasing all the silk of those marks, employed W. H. Smoult, W. P. Weston, and others, who carried on business in Calcutta, under the name of Tulloh and Company, to contract with the firm of Carr, Tagore & Co. on account of the plaintiffs, for the purchase of all the silk to be manufactured in their said filatures, and known by the said mark. That in December 1844, Tulloh & Co., acting on behalf of the complainants, and by their authority through Hickey, Bailey & Co., as brokers, entered into a contract with Carr, Tagore & Co., as appears by a bought note, the material parts of which are in substance as follows :—

"To Messrs. Tulloh & Co.

Dear Sirs,—We have this day bought from Messrs. Carr, Tagore & Co., by your order, and on your account, and on behalf of your London Correspondent, all the raw silk to be manufactured at their Comercally filatures, and known under the marks, Commercally Filatures, and R. O. N. J. A. M. &c.

1. The contract is to include only the abovenamed marks, and Carr, Tagore & Co. are not bound to deliver during the period hereinafter mentioned, any specific quantity, but only the whole of produce of the filatures, which they will work *bonâ fide*, exactly as if they were working on their own account, without any contract.

2. The contract to commence with the March bund, 1845, and to continue in force till the March bund of 1847.

3. The price to be Rs. 13-1 per factory seer for the produce of the rainy bunds, and Rs. 14, for that of the dry bunds.

4. The quality of the silk is guaranteed by Carr, Tagore & Co. as equal to the samples of that shipped during the last two years; if there be any deviation, the contract is to be null and void as regards such parcel, and the silk may be rejected at your option.

5. The silk to be paid for on delivery. Delivery to be katen within ten days of the arrival of any parcel in Calcutta; failing the payment within that time, Messrs. Carr, Tagore and Company may sell it at the market price; and should this be under the contract rate, you agree to pay the difference.

6. Each parcel of the silk to be examined by us (meaning the writers, Hickey, Bailey & Co.) as it arrrives in Calcutta, and no objection to be raised after such examination: but if objections are raised, you are not bound to take delivery till the points in dispute have been decided by us.

7. The silk to be packed to your satisfaction.

8. Any question, arising between the parties to the contract from difference of opinion as to the meaning of any of its terms, or the quality of the silk, to be settled by us, so long as two of us continue in the firm.

9. As you have no authority to make advances previous to the receipt of the silk, and as Carr, Tagore & Co. stipulate for the advance in part, of the sum which they are out of pocket to carry on the filatures, the advances proposed, being Rupees 50,000, at such times, and in such portions as they may require, after the delivery of the first parcel of silk under this contract, so that such advances shall not at any time be in excess of Rupees 50,000, beyond the silk delivered, for which interest at the rate of 6 per cent. will be allowed, and it is agreed that the question of advance shall be an open question, and that in the event of the advances being authorized, the contract shall at once be in force.

(Sd.) Hickey Bailey & Co."

That the complainants authorized the advances, and Carr, Tagore and Company, delivered twelve bales of silk on the 4th of May 1845, and thereupon the firm of Tulloh and Company, having arranged with Carr, Tagore & Co. immediately to advance the whole sum of Rs. 50,000 with the knowledge of Carr. Tagore & Co. drew bills specifically for that amount on the complainants — upon which bills they raised the sum of Rs. 50,000. On the 27th of May 1845, by indenture between D.M.Gordon of the first part, William Carr, D. Tagore and others, original, and new members of the firm of Carr, Tagore & Co. of the 2nd and 3rd parts; W. H. Smoult and others, (Tagore & Co.) of the 4th part; and Bailey as trustee for (Tulloh & Co.) of the 5th part; after reciting the said contract, and that it had been further agreed that the parties thereto of the fourth part (Tulloh & Co.) should lend and advance to the parties thereto of the third part, if they should require, the said sum to be advanced, to be deemed and taken as a payment in advance of the price of the silk so contracted for as aforesaid, but so that the parties thereto of the fourth part, should not be at any time in advance to the parties thereto of the third part, in a larger sum than Rs. 50,000, over and above the price of the silk, which should, for the time being, have been delivered in pursuance of the contract, and that the repayment of the said advances with interest at the rate of 6 per cent per annum should be renewed by the said indenture, it was witnessed that D. M. Gordon conveyed to Francis Bailey, the Comercally Factory &c., to hold the same upon trust for securing the payment of all and every such sum of money not exceeding Rs. 50,000, as Tulloh and Co. might lend or advance to Carr, Tagore & Co. or the members of the firm for the time being, in pursuance of the recited contract with interest &c., and for that purpose, in case default should be made in payment of the whole or any part of sum or sums of money on the first of May 1847, or in case of the breach of the covenant of Carr, Tagore & Co. to keep the factory in good order upon trust, to sell the premises assigned, and out of the proceeds, in the first place, to pay the costs of sale, and in the next place, to retain the sums which Carr, Tagore & Co.. should be indebted in respect of such advances so to be made as afore-

said; and Tulloh & Co. thereby covenanted, that they would, from time to time, during the continuance of the said contract, when and as they should be required by Carr, Tagore &Co.lend and advance such sum as they should require; such sums which should or might be so lent and advanced, to be deemed and taken as a payment in advance of so much of the prices of the silk so contracted for as aforesaid, but provided, nevertheless, that (Tulloh & Co.) should not be required to be in advance at any one time to Carr, Tagore & Co. in respect of such loans or advances thereby covenanted to be made, in a larger sum than Rs 50,000, over and above the prices of the silk, which for the time being, should have been delivered to them, in pursuance of the contract &c. That Tulloh & Co. shortly afterwards paid Rs. 50,000 to Carr, Tagore and Co. That all the parties well knew that the complainants firm, Van Notten & Co. were the principals for whom Tulloh & Co. entered into contract, and that the monies advanced were the monies of Van Notten & Co.

That although it is by the indenture provided, that the sums advanced were to be deemed and taken, as payment in advance of the price of the silk, Tulloh & Co. had no authority to insert such stipulation. That the recital of an agreement to that effect, was an untrue and fraudulent recital. That the complainants always kept Tulloh & Co. in funds to pay for such specific delivery of silk, or enabled them by a letter of credit to draw on the complainants. That Carr, Tagore and Co. contriving with Tulloh and Co., to defraud the complainant, and as an inducement to Tulloh and Co. to befriend them in the conduct of the contract by permitting them to ship mixed Silk, procured the said stipulation, concerning the advance of Rs. 50,000, to be inserted in the deed behind the back of, and unknown to the complainants; thereby giving credit to Tulloh and Co., and enabling them to make use of the complainant's monies to that extent, for their own ends; and the complainants contend, that under the circumstances aforesaid, and in so far as the said stipulation or permission concerning the said advance of Rupees 50,000, was at variance with their original agreement, and the bought and sold notes of the 14th of December 1844, and with the instructions by the complainants given to the

firm of Tulloh and Co. as aforesaid, the said new stipulation was fraudulent in operation, and not binding against the complainants, and that the said sum of Rupees 50,000 so paid and advanced on account of the complainants as aforesaid, ought not to be deemed and considered as paid in advance of the price of the said silk so contracted for as aforesaid, but as an advance made at the time of the confirmation of the contract, in part reimbursement of the sum which Carr, Tagore and Co. were out of pocket for carrying on the said filatures.

That by a declaration of trust made between Tulloh and Co. and Van Notten and Co., and dated the 13th of June 1845, Tulloh and Co. acknowledged that the Rupees 50,000 were the monies of Van Notten and Co. That Carr, Tagore and Co. were cognizant of the terms of the deed.

That for some time after the payment of the sum of Rupees 50,000, Carr, Tagore and Co. delivered to Tulloh and Co., large quantities of Comercally silk which were shipped to England, and there received by complainants, and never received any payments from the said firm of Tulloh and Co., until the advance of Rs, 50,000 was fully exhausted, although they well knew, that the firm of Tulloh and Co. was always kept in funds by the complainants, for each parcel of silk delivered, in cash.

That the complainants have now discovered, that no part of the silk was delivered to Tulloh and Co., or shipped by or through them. But that from the commencement of the contract to May 1346, the silk was sent from the Comercally factory in bales, ready packed and prepared for shipment, to Carr, Tagore and Co., and was by them deposited in their godowns; and on the arrival thereof notice was given to Tulloh and Co., and to Hickey, Bailey and Co., who were to inspect the same; that Hickey, Bailey and Co. never did inspect the same, but employed one Lavalette, to go through a form of doing so. That Tulloh and Co. with full notice of such insufficient inspection, paid Carr, Tagore and Co., for the same, or for so much of the same as was

not rejected, after the advance of Rupees 50,000 was exhausted, but not till then, with monies provided by the complainants.

That about March 1846, the complainants discovered that a great portion of the silk shipped, was not genuine Commercally silk, but silk of inferior quality manufactured at other stations, which after the date of the contract, Carr, Tagore and Co. fraudulently pretended to make a part of the Commercally factory, and by this fraudulent contrivance, Carr, Tagore and Co increased the quantity of silk delivered under the contract, from about 200 maunds, to 15,000 maunds yearly. The bill set out a series of specific charges of fraud in the packing of the silk, alleged to have been discovered after the arrival of the bales in London. It further alleged, that in consequence of the fraudulent conduct of Carr, Tagore and Co., the complainants gave notice that they would not take any more of the silk under the contract, and that they considered the contract as rescinded. That on the first of May 1846, W. H. Smoult retired from the firm of Tulloh and Company. That on the 10th of May 1846, the complainant's attorney Mr. Goldsworthy, applied to D. M. Gordon to allow him to take delivery of the silk, and to superintend the working under the contract; but that D. M. Gordon declined, saying that the contract was with Tulloh and Co., and that without the assent of Tulloh and Co., Carr, Tagore and Co. would not deliver the silk to Goldsworthy. That between the 1st and the 19th of May 1846, Carr, Tagore and Co. gave notice to Tulloh and Co. of the arrival of 16 bales of silk, and shipped the same to the complainants, without requiring payment, pursuant to the terms of the contract, and took a promissory note of Tulloh and Co. for the sum of Rupees 18,024, which they took as payment. That Tulloh and Co. suspended payment on the 19th of May, and were adjudicated insolvents on the following day. That shortly after the failure of Tulloh and Co., Carr, Tagore and Co. received notice, that the complainants considered the contract for the delivery of silk at an end, and that they claimed to rescind the contract, by reason of the breach of agreement on the part of Carr, Tagore and Co., but Carr, Tagore and Co. refused to assent to the rescision, and claimed to be entitled to continue to deli-

ver the silk, until the expiration of two years in the contract mentioned. And further in violation of the 6th Article of the contract, even supposing the same to have been in force, which the complainants submit it was not, inasmuch as the said firm of Carr, Tagore and Co., with knowledge of the real principals, elected throughout to deal with Tulloh and Co. as principals up to the date of their failure, and that thereby their failure put an end to the contract, as far as Carr, Tagore and Co's option was concerned, but not so as to preclude the complainants from recovering in equity their said advance, Carr, Tagore and Co. shipped large quantities of spurious silk to Mitchell and Co., their agents in London, with instructions to hold the same, for and on account of the complainants, and if the complainants refused to accept the said bales, to sell them, and debit the complainants with the difference between the sum realized, and the contract price. That Carr, Tagore and Co, drew Bills against the complainants for the amount of the invoices which were made out in an unusual and unmercantile way. That the complainants having refused to receive this silk, or accept the Bills, Mitchell and Co. sold the silk at a great sacrifice and at prices under the market prices, and very much below the contract prices for genuine Commercally silk in India; and the complainants submit, that they are not liable for any part of the deficiency, but are at liberty to treat the contract as rescinded by reason of the premises.

That the whole of Rs. 50,000 was on the 1st of May 1847, and now is due, together with interest which Carr, Tagore and Co. have refused to pay. And the complainants being desirous of having the said principal sum paid, applied to Carr, Tagore and Co., but they refused under claim of set off, or retainer as aforesaid. On such refusal, they called on Bailey, to see that the firm of Carr, Tagore and Co. repaired the works; he refused to do so, and Carr, Tagore and Co. have suffered the works to fall into disrepair. On the 17th of February 1848, Hickey, Bailey and Co. were adjudged to be insolvents. Carr, Tagore and Co. have threatened to proceed at Law against the complainants upon the contract.

The Bill prays that an account may be taken of what is due and owing to the complainants, for principal and interest in respect of the

said sum of Rs. 50,000 so advanced to the said firm of Carr, Tagore and Co., as aforesaid,—that in taking the account it may be declared that Carr, Tagore and Co., are not entitled to any set off in respect of silk shipped to London on account of the complainants, since the first of May 1846, or in respect of silk not actually received by the complainants, or in respect of the difference between the prices realized and the contract prices; or if the Court think that defendants have such counter claim, that the complainants may be declared entitled to set off against the same, the loss sustained by the complainants by reason of the inferiority and spurious quality of the silk: that it may be declared that the contract was wholly rescinded and put an end to, from the 19th of May, or such other time as the Court may think fit: that it may be declared that the defendants have no set off for silk supplied after that date, or for that paid for by the promissory note of Tulloh & Co. for Rs. 18,024: that the defendants be ordered to pay what shall appear due on such account as aforesaid, and in default of payment, Francis Bailey may be ordered to sell the mortgaged promisses, and apply the monies to arise from such sale, in payment of what shall appear to be due to the complainants as aforesaid; and that if the monies to arise from the sale are insufficient, or if the Court shall think that the complainants are not under the circumstances entitled to the security of the factory, then that the defendants be decreed personally to pay the balance, or sums due to the complainants, and all losses sustained by the complainants in respect of the said firm of Carr, Tagore and Co., by a short day, to be limited for that purpose.

The relief sought by the bill appears to be founded exclusively on the claim to treat the sum of Rs. 50,000, simply as a loan to the defendants by the mortgage of the factories, and for the purpose of getting rid of the provisions of the Mortgage deed, which show that the Rs. 50,000, were to be deemed and taken as payment in advance of the price of silk. The bill alleges that those provisions were introduced into the deed of mortgage by fraud and collusion between Tulloh and Co., and Carr, Tagore and Co.; and for the further purpose of excluding from the account, all transactions subsequent to the 19th of May

1846, the bill alleges and sets up other frauds and rescission of the contract. The case of fraud wholly failed in proof. In fact all charges of fraud were abandoned upon the hearing. On the point that the contract was not rescinded by the insolvency of Tulloh and Co., the plaintiff's agents, on the retiring of W, H. Smoult from that firm, and that it could not be rescinded by the plaintiffs by any act of theirs, without the consent of the defendants, I entirely concur with the Judgment of the Court below: therefore, and as the case made by the Bill, wholly and utterly fails, I am of opinion that the plaintiff's suit has been properly dismissed. He prayed for a relief, founded upon charges of fraud, and on his failure to substantiate them, or any of them, he is not entitled to turn round and ask for a decree for an account, on the footing of these claims of the mortgage deed, for the express purpose of repudiating which, the bill was filed. In such a case it is not enough that some of the facts shew that the plaintiff may be entitled to relief under a distinct head of equity, see *Price* vs. *Berrington*, 3 Mac and Gor 498. *Ferriby* vs. *Hobson* 2 Phillips, 255, *Glascott* vs. *Lang*, 2 Phillips, 310. In the present case I think it would be in the highest degree inequitable, to allow the plaintiff to make such a new case. I see nothing to lead me to suppose that if an account had been originally prayed for on the footing of the mortgage, the defendants would not have at once agreed to account. In fact, the bill appears to admit that if the account was so taken, the 50,000 Rupees must be deemed to be satisfied. The bill contains no offer on the part of the plaintiffs to submit to perform the contract on their part, or to allow the defendants compensation in taking the account for breaches of the agreement committed by them. It contains no offer by the plaintiff to pay balance which on taking an account on the footing of the mortgagees deed would be found against them as it should have done, had it been framed as a bill for an account. See Daniels Chancery Practice Vol. 2 p. 69.

I see nothing to lead me to suppose, that the plaintiff, at the time of filing his bill, asked for or desired any such account. Indeed, it was not brought before the Court below, or before us, after we had pointed out to the plaintiff's counsel that such was the relief to which, if any

the plaintiff was entitled. Although it may be convenient for the plaintiff now, in order to escape the payment of costs and other inconveniences, to say that on the bill, and on the evidence, it appears that they are entitled to some relief other than that prayed for, it appears to me, that we could not grant it on the present bill, at this stage of the proceedings. The 6th clause of the contract provides a means by which the defendants might have ascertained the loss, by reason of the plaintiff's omission to accept silk under the contract during the period from the 19th of May 1846, to the conclusion of the contract, by selling it at the market price, which probably means the price obtainable for it in Calcutta at the time. Had the defendants adopted this course, the plaintiffs would have been bound under this clause, to pay the difference between the contract price and that actually realized In the ordinary form of an account, taken before the master, such differences might have been allowed. In the present case, instead of so selling the silk, the defendants sent it to London, and after tendering it to the plaintiffs, sold it in London. This is a course which they were clearly at liberty to adopt for their own convenience or security. But they cannot, by such means, charge the plaintiffs with any greater damages for the non-acceptance of the silk, than they would have sustained, had they sold the silk to the best bidder in Calcutta. The defendant's remedy, was by an action for damages for not accepting the silk. There can be no doubt but that if the plaintiff had sued for an account on the footing of the mortgage deed, without offering to make all just allowances for breaches of the contract on their part, the defendants would either have demurred to the bill as suggested by the Advocate General, or if not, or if the demurrer was overruled, would probably have preferred an action for damages *pari passu* with the bill, so that the whole of the cross claims between the parties, would have been adjusted at the same time.

Looking at the difficulty which the defendants had, in suing the plaintiffs who reside in England, they may well have been content to rest satisfied with their hold on the sum of Rs. 50,000, to cover the losses they sustained by reason of the breaches of contract on the part of the plaintiff.

In order to prevent any injustice to the parties, we suggested that the bill should now be amended, on payment of costs, down to the present time and an account taken on the footing of the mortgage deed, making all just allowances, but the plaintiff's counsel refused to accede to this suggestion.

Under these circumstances, it only remains to say, that the judgment of the Court below must be affirmed, and the Bill dismissed with costs.

Phear J.—I concur with the Chief Justice in thinking that this appeal ought to be dismissed, but I desire to say, that I base my judgment solely on the ground, that the plaintiff mainly supported his claim to relief, by allegations of fraud and collusion which were so entirely without foundation that he was obliged to abandon them at the hearing. I am inclined to think, that his bill is framed wide enough to embrace a larger right to an account, than that decided upon in the Court below, and a right, which is probably supported by the evidence; but I do not consider it necessary to decide this point, because I am satisfied, that the plaintiff, in bringing his suit, relied solely on the charges of fraud and collusion which he failed to establish, and that the general right to an account, never was put before the Court below, nor was ever intended to be set up.

Appeal dismissed with costs.

Appeal.

W. GRANT AND OTHERS *vs.* JUGGOBUNDO SHAW.

Doyne with *Marshall* for Appellants.

The *Advocate General* with *Eglinton* and *Newmarch* for Respondent.

ments by that firm in his name. He had a separate contract with Messrs. Grant, Smith and Co. for shipping the jute, for which he was paid five annas per bale. Ramcomul had a seat in the office of Grant, Smith and Co., and had also an office in China Bazar, where he employed some servants, whom he paid out of his *dustooree.* The Bazar dealers were never paid by any Member of Grant, Smith and Co.'s firm, but always by Ramcomul. From the 27th August 1862, he had a banking account of his own, and used to pay by means of his own cheques on that account. As to the funds supplied to him, Ramcomul says, " When I tendered a bill Mr. Grant put in some marks. I took it to Mr. Wyllie, who calculated it to see that the arithmetic was right, and as soon as he satisfied himself that the calculation was right, I used to divide the total amount amongst the number of bales at so much per bale, and then Mr. Grant passed the account and was paid. Sometimes Mr. Grant asked me, 'Have you paid that amount to the bazar dealers? He certainly trusted me. I used to take delivery first, and when the amount came to twenty, thirty or forty thousand Rupees, I used to ask Mr. Grant for payment. During 1861 and 1862, I used to draw money on account, generally without reference to any particular dealer having delivered any particular quantity. The jute account was a running account, that we used to close, sometimes in two months, sometimes in three months, and sometimes in six months." In cross-examination Ramcomul said—" I don't know whether Mr. Grant ever took any steps to ascertain whether particular large sums which he had paid me, or any part of them, had been paid to the bazar dealers. If I was his agent, Mr. Grant had no security except my honesty. Before I began to buy for him, I was a writer in Mr. Henderson's office at Rs. 40 per month. I had no property at all of my own. Mr. Grant never asked me for any security. Some houses do take security from their banians; others do not. I know of no instance in which a banian buys and sells for any English house here without giving security."

It was strenuously pressed by Counsel in the Court below that a change in the system of dealers took place after settlement of accounts between Grant, Smith and Co. and Ramcomul, on the 12th of January 1863. But that point was abandoned by Mr. Doyne, who

admitted before us that no change in the relation of the parties then took place, and indeed I think it clear that he could not have successfully maintained the position originally taken up.

The plaintiffs' gomastah proved that the first time that Ramcomul Mitter hase to purchase Jute for him which was on the 1st of *Maugh, i, e.,* about the 13th of January 1863, he declined to part with it until he had made enquiries as to the truth of Ramcomul's representation that he was the agent of Grant, Smith and Co. The learned Judge disbelieves, and we think rightly so, the statement of this witness, as to the conversation which this witness alleged, took place with Mr. Grant on the subject; but it is clear that some enquiries were made, the result of which was, that being satisfied, he sold the jute required, and the entry in his books appears in the following form:—

" Debit side

Grant, Smith and Co.,

Station Calcutta, through

Ramcomul Mitter

Jute, &c. Rs. ...2,880 6 0

The jute was delivered by the plaintiffs, and a receipt taken, signed "For Grant, Smith and Co., Ramcomul Mitter."

The defendants' chief point, as appears from the evidence of Mr. Grant, who was examined by commission in Scotland, was, that they dealt with Ramcomul Mitter as a contractor. He says, " I know a person in Calcutta named Ramcomul Mitter; his business consists in dealing in jute and screwing jute. Between the months of January and June 1863 inclusive, I, on behalf of the defendants, entered into several verbal contracts with the said Ramcomul Mitter for the sale by him to the defendants of various quantities of *screwed jute.* In every one of these contracts, the defendants, and I for them, contracted with Ramcomul Mitter as principal, and not as an agent for the defendants.

In every one of the contracts as specified, the price was fixed, which price Ramcomul Mitter was to receive, and he was, in some of the cases, to be paid by the defendant a commission on the sales. Ramcomul was not a servant of the defendants, and did not receive from them any pay or salary. With reference to the *screwed jute* so purchased between January and June 1863, I, as representing the defendants, did not authorize Ramcomul Mitter directly or indirectly to buy the jute from the plaintiffs, or any one else in my name, or to pledge the credit of or sign for the firm."

The construction which Mr. Grant puts upon the dealing between himself and Ramcomul was, that he bought bales of *screwed jute* from Ramcomul. But I think this suggestion is wholly incorrect. In considering the true nature of the dealings between Ramcomul and his employer, it is most important to look at the accounts on the footing of which Ramcomul was paid. They are simply accounts of *rough jute* purchased, not purporting to charge any one as debtor, charging Grant, Smith and Co. with all the expenses, taking for himself a mere fixed sum of four annas per bale as *dustooree.* It is clear from these accounts that the *jute* was bought as Grant Smith's jute, and that Ramcomul had no interest in or right to any profit out of it. He was dealing as a mere servant, and paid as a servant by a fixed charge.

It appears from the judgment of the learned Judge that these accounts were kept back by the defendants, notwithstanding that a notice to produce them had been given, and on enquiry from the learned Judge, we find that it was only on a pressure being put upon him by the Court that the defendant's attorney at the close of the case reluctantly produced them. There are no traces on the evidence of any contracts, or of accounts kept with Ramcomul as an independent contractor, and therefore I think that this ground of defence wholly fails.

What, then, was the position of Ramcomul at the commencement of the relations between him and Grant, Smith and Co.? He

was a mere servant, empowered and authorized by his master to buy goods—not furnished by his master with funds for the purpose of paying for them—having no property—and presumably no credit of his own in the bazar.

Now, it is a general principle, that every principal authority carries with it or includes in it as an incident all the powers which are necessary, or proper, or usual, as means to effectuate the purposes for which it was created; see *Story or Agency*, Section 97, where an instance is given,— "An order to send goods to the principal from a foreign country implies a power to ship them generally, so as to bind both the principal and the goods for the freight." Again, at Section 102 it is said, "A power to buy a thing, if the agent is not furnished with funds, includes the power to buy on credit."

This view accords with that of Lord Ellenborough, in *Rusby* vs. *Scarlett*, 5 Espinasse 76, which is very like the present case in its facts. An action was brought by the plaintiff against the defendant to recover the price of hay sold by the plaintiff for the use of the defendant's ponies. The plaintiff proved the delivery of the hay at the defendant's stables with bills of parcels, but there was no evidence of his ever having seen the defendants, or ever having received orders from him or any payment of money. The defence was that the defendant had given his servant the money for the purchase of the goods, and it appeared that the defendant kept a book, in which were entered the articles procured by the servant, and the sums advanced to him: but the advances did not appear to have been made specifically for the purchase of the articles bought, but generally, from time to time. Lord Ellenborough told the Jury that "if the goods were taken up, and the money given *afterwards* to the servant to pay", he was inclined to think the master liable, for he hadgiven to the servant authority to take up goods upon credit. It was, therefore, material to see when the money was given. If the servant was always in cash beforehand to pay for the goods, the master was not liable, as he never authorized him to pledge his credit; but if the servant were not so in cash, he gave him a right to take up the goods

on credit, and he thought he would be liable, as the servant has not paid the plaintiff, though he may have received the money from his master." Speaking of such cases, Mr. Addison, in his Treaties on Contracts says,—"The existence of an implied authority to bind the principal is a question of fact to be determined by a careful consideration of all the surrounding circumstances; the rule of law being, that whenever the principal, by his conduct, has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal, and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded. The principal cannot cut down or circumscribe the apparent general authority, by secret limitations and restrictions, of which the parties dealing with the agent are entirely ignorant."

Applying these principles to the present case, I think that it must be assumed as against Grant, Smith and Co,; and in favor of a person not shown to have any notice of any restriction of the authority of Ramcomul by Grant, Smith and Co., that he had authority to pledge the credit of the firm.

Mr. Doyne argued with great ingenuity that such a presumption ought not to be made here: that according to the usual course of dealing in this country, when a European-house purchases goods in the bazar through the medium of a Native intermediary, credit is given to such agent, and the dealers do not look to the European-house of business or principal for payment, unless there is an express contract, by or on behalf of the European firm, that they will be responsible. He instanced the cases of mercantile houses, buying goods through a banian, and private individuals making purchases by a *khansamah* or sirdar bearer; and he referred us to the case of *Palbyram* and *Boidjonath* vs. *Paterson*, 2 Boulnois, 203.

But the answer to this is, that Ramcomul was not a banian, nor did he occupy the position of a banian, either as regards the house by which he was employed, or as regards the traders in the bazar. A

Banian often, if not generally, advances money to the firm in which he is employed—he gives security. If he sells the goods of the firm, he is a sort of *del credere* agent, guaranteeing the payment of the price by the bazar dealers or other purchasers to his principal, and as to purchases he is the direct purchaser in the bazar. The usages of the bazar applicable to the well-known relation of merchant and banian accredited by the house, were not shown by any evidence in this case to have any application to the case of a person standing in such a position as Ramcomul did with regard to Grant, Smith and Co. He is described as bazar sircar. So, again, with respect to the khansamah and the sirdar bearer. The relation in which such persons stand to their master is one perfectly well-known and understood. The convenience of all parties has led to a custom of trade; by which credit is given to such persons making small purchases for their masters in the ordinary, well-understood course of their employment and business. But, if they were employed to make large purchases of merchandize, or to enter into contracts not within the usual scope of the authority of persons of such character, I know of no custom of trade in the bazar which would justify the Court in applying any other than the ordinary rules of law to the case, and it would be difficult to convince me than the master would not be responsible.

Lastly, it was contended that, even supposing that the plaintiff might have been entitled under the circumstances to give credit to Grant, Smith and Co. as principals ; in point of fact, such credit was not given. On this point I observe, that the goods are entered to the debit of Grant, Smith and Co. in the plaintiff's books, and receipts for the goods are taken in their names. The probabilities are strong that credit would originally have been given by the bazar dealers, not to Ramcomul, but to Grant, Smith and Co. The plaintiff, who would not let Ramcomul have the jute without making enquiries, did, no doubt, on such enquiry, hear that he was *Grant, Smith* and *Co.'s* man. It is more reasonable to suppose that they heard the truth as to the matter, than that they would suppose that they were dealing with a banian.

When Grant, Smith and Co., no inconsiderable firm, but the largest buyers of jute in the market, dismissed Ramcomul, it is clear that the news that they repudiated their liability would spread rapidly amongst the Jute dealers in the bazar; and the step is immediately taken by one of them not of suing Ramcomul, but of indicting him for falsely representing that he had authority to pledge the credit of Grant, Smith and Co.

It is said that the present plaintiff did not make any claim against Grant, Smith and Co. for three months. He, however, commenced his action before the acquittal of Ramcomul at the Sessions. And for my part, I do not think that the mere delay, doubt, and hesitation before commencing an attack on a wealthy and powerful European firm, which repudiated a liability arising out of relations which were certainly unusual, if not entirely new to the experience of the bazar dealers, ought alone to induce us to disbelieve the evidence, verbal and documentary, which shows that, in fact, credit was given by the plaintiffs to Grant, Smith and Co.; nor does the fact that the plaintiff had accepted payments for Ramcomul, in my mind, carry the matter further than this—that they knew the hand from whom payment would come. The person who conducted all the jute business of the firm was Ramcomul. The plaintiff's gomastah has greatly injured what appears to me to have been a good case by attempting to strengthen it; and if the evidence was confined to his statements alone, I would not trust to his evidence as a sufficient ground on which to base a judgment for the plaintiff.

But taking all the facts together, they satisfy me that the plaintiff did not trust to Ramcomul alone, but that he must have looked to Grant, Smith and Co, as principals. I therefore think that the judgment of the Court below must be affirmed with costs.

Phear J.—This action is brought to recover the price of certain jute, which the plaintiff alleges that he sold and delivered to the defendants through their agent, one Ramcomul Mitter, on various occasions previous to May 1864.

The defendants admit that the jute was ultimately received and appropriated by them, but they say, that they brought it of Ramcomul as an independent contractor, that they have paid him for it, and that he was in no way their agent. They also contend that the plaintiff, in the first instance, gave exclusive credit to Ramcomul, and that therefore, as he, the plaintiff, had, according to his own account, knowledge of defendants being the principals, he cannot now, under the circumstances which have happened, be entitled to have recourse to the defendants.

As to the agency, the plaintiff relies upon Ramcomul's testimony, and upon the nature of the accounts, which Ramcomul rendered to the defendants. His Gomastah also himself spoke to an interview with Mr. Grant, in which he says that Mr. Grant, in so many words, avowed that Ramcomul was the agent of the firm for the purchase of jute. The Court below (I think most correctly) for the reasons stated by the learned Judge, entirely rejected this part of the Gomastah's evidence, as being untrue. This plaintiff further urged that, at any rate, the defendants were prevented from now denying the agency of Ramcomul, because they had so acted, previously to and during the sale transactions, as to hold out to the world that Ramcomul was their agent; namely that they knew he was assuming to be their agent, and was so supposed to be in the Bazar, and yet they took no steps to publish a denial. In my judgment, whatever may be the value of the evidence as to the supposition of the dealers in the Bazar (the defendants among the others), there was nothing adduced to show, or to raise the presumption, that this was brought home to the knowledge of the defendants, or that they ought to have known it; and without such knowledge, real or constructive, no estoppel against them can arise. Certainly the moment they knew that he, while shipping the jute, was signing Custom House permits nominally as their agent, they stopped him, although the effect of his representation in this respect could hardly have injured them; and as there can be no doubt that they, from the beginning of these transactions, desired to escape having their credit pledged, it is incredible that they should know of his holding himself out to dealers as their autho-

rised Agent, and yet remain silent. Then it is said that Ramcomul was, during the preceding two years, the agent of the defendants in jute buying, and that as they had never given any notice of his having ceased to be so, they could not now repudiate his authority. On the other hand, the defendants say that no change in his position with regard to them ever took place, and that he never was in any way their agent, so that this head of estoppel reduces itself to the question, whether or not he ever was at any time *de facto* the agent of the defendants to purchase jute for them on credit.

Then what were his actual relations with the defendants? Were they such as to constitute him their agent to pledge their credit in this matter? Ramcomul's evidence, and the accounts rendered by him to the defendants, show very clearly what his course of business was. He used to buy in detail in the Bazar, collect the parcels, get them packed, screwed, and then put on board ship. From time to time, he made out an account putting down the cost of the jute in a lump item, without specifying the dealers from whom came the several parcels, which went to make it up; then he added lump items for conveyance, packing, screwing, &c., respectively; and finally, he added an item for his own remuneration, calculated at the rate of 4 annas per screwed bale. The total he charged against the defendants. Latterly, at any rate, he was not paid the exact amount of their accounts, at the time of rendering them or at any other time, but he was supplied with funds by the firm, whenever he chose to apply for money for the purpose of covering these charges, and he used to pay the Bazar dealers by cheques on his own private banking account, quite irrespective of the defendants, and without accounting to them in reference thereto.

Mr. Grant, the then managing partner of defendants' firm, says that all this was done by Ramcomul, not as agent, but as himself principal in accordance with contracts made with him by the firm; in which it was agreed that he should supply the jute, and that he should be paid for it all his costs out of pocket, coinciding with the items (above-mentioned) together with a profit of 4 annas per

screwed bale. He adds that Ramcomul was not in any way the agent of the firm, and neither directly nor indirectly authorized to pledge their credit. That he was not intended to have such authority I readily believe, and there would be no necessary implication of such authority if the facts were, as Mr. Grant broadly states them, with reference to specific contracts of purchase between the firm and Ramcomul. Contracts of purchase with such peculiar stipulation in regard to price might no doubt be made, but the same results are so much more naturally attributable to a contract of agency, that any one relying on the special contract, ought to take care to provide himself with unmistakeable evidence on the point. Unfortunately, Mr. Grant was not cross-examined; and in chief his statements are most general; not a word of explanation as to the times and occasions of these supposed contracts, or as to what led to them; while on the other hand, external circumstances all favour the conclusion that the transactions between the firm and Ramcomul were agency transactions. It is most difficult to believe that Ramcomul was in any sense at arm's length for the firm in these matters. He succeded his brother in something that bears very much the appearance of being an exclusive employment at their hands; at any rate he seems himself to have had no other occupation than that of buying for the purpose of supplying them. His constant reference to them with regard to prices, and the way in which their investigation of his accounts became less and less minute, bespeak his position as one of trust, and are most hostile to the supposition that his relation to the defendants was merely that of party in a series of contracts. On the whole, I cannot resist the conclusion that he was in fact buying for the firm as their agent, on commission of 4 annas per screwed bale.

In my view of the facts, the firm sent Ramcomul into the Bazar to purchase for them, without any restriction as to ready money purchases in contra-distinction to credit purchases, but with the understanding that he should not pledge *their* credit. They intended his dealings in the Bazar to be those of a Banian buying in reference to the recognized custom in that behalf, and probably made their

peculiar arrangement with him, merely for the purpose of obtaining a stricter hold over him, and perhaps securing cheaper bargains than would be the case with a regular Banian.

There is no attempt to contend that this express prohibition against pledging of credit ever became known to the plaintiff, and in the absence of knowledge on their part of this fact, the defendants cannot avail themselves of their special directions to Ramcomul, after having sent him into the market to purchase, in what manner, either for ready money or not, he thought best.

The sole question that remains then is, did the plaintiff, with his eyes open, give credit to Ramcomul, and not to the defendants? The Court below does not appear to have attached much importance to this branch of the case, but having come after elaborate argument to the defendants, and whether they authorized Ramcomul to pledge their credit, most concisely says that he believes the plaintiff acted all through *optimâ fide*, and only trusted Ramcomul as the Agent of the defendant. The learned Judge omits to give his reasons for this belief.

The evidence on this point is no doubt very slight. The Gomastah's own statement standing alone cannot be relied upon, because it is admitted on all sides that he told a direct lie, for the purpose of making out that the contracts were made with the defendants, and not with their agent. Ramcomul does not touch it specially: he confines himself throughout to saying that he acted as the defendants' agent, and not as principal, and even had he gone further, his interest in shifting the burden from himself to the defendants is so great, as would have prevented his assertions from carrying any weight.

The delivery receipt, signed by Ramcomul for Messrs. Grant, Smith & Co. does not help us either way, for the facts in the case of *Palbyram* vs. *Paterson*, Boulnois 203 shew that receipts in the form these bear are quite consistent with Banian transactions. The entries in the plaintiff's books are the sole direct evidence that we have to look to. In them, the sales in question, are credited to the defendants, through Ramcomul Mittor. One book only was produced, and that was of the

nature of a journal. It unfortunately was not in a shape to carry with it the highest credit, for it consisted of a set of loose sheets strung together on a piece of twine, affording the greatest possible opportunity to falsify any item of accounts, if the desire to do so existed. This was not fortified by any Ledger or other form of classified account. Let us now look to the outside probabilities of the case. The evidence seems to me to favour the conclusion that Ramcomul was behaving outwardly in the Bazar in all respects, as if he were the defendants' Agent, in that enlarged form of the del credere Agent, who is known in this city as Banian. As regards the present question, it is, I think, quite immaterial, whether he was, as between himself and the defendants, exactly in the position of a Banian or not. The plaintiff's Gomastah, after a superficial enquiry in the Bazar as to the defendants' mercantile existence, made, as I think, for the sole purpose of satisfying himself that Ramcomul's assumption of character was probably real, dealt with Ramcomul exactly as he would with a Banian, without making any express stipulation, either with Ramcomul or his principals, that the usual custom in regard to credit should not attach. The question before us is one of fact entirely. The judgment in 2 Boulnois, as I read it, is authority for saying that in dealings of this character, the recognized custom is in the absence of such an express stipulation as I have mentioned, conclusive evidence that the vendor gave exclusive credit to the Agent. The peculiarities of the trade in this country between European houses and the Native dealers, so well and forcibly pointed out by Mr. Doyne, seem to me to demand that this should be so. The entries in the plaintiff's book, without saying how far this can be relied on, certainly do not go the length of suggesting any such express stipulation, and I have no difficulty in concluding that there was none. On the assumption then that Ramcomul was in the Bazar doing neither more nor less than what belonged to the character of a Banian, and was not questioned in that respect on behalf of the plaintiff, I should be satisfied that the plaintiff gave credit in these sales to Ramcomul only, knowing that he was buying for the defendants ; and I should not arrive at this conclusion merely as a legal construction from the custom, for I think it is fairly justified by the plaintiff's conduct

throughout. He never went near the defendants in the matter: he delivered to Ramcomul at his own place of business (where he had an establishment paid by himself quite away and distinct from the defendants) or to his order: he went there for payment: he took Ramcomul's own private cheques as payment: and finally, although he knew that all connection between Ramcomul and the defendant was broken in the middle of June, he never applied to the defendants in any way until he sent them a lawyer's letter in reference to the subject of this suit at the end of August. It is true that during part of the intervening time, Ramcomul was being criminally prosecuted by some third person, for having in another case falsely pretended that he was Agent of the present defendants; but I do not think this a complete explanation of his silence. On the contrary, I am rather disposed to think that it might be the institution of this prosecution, which suggested to him the possibility of turning his claim from Ramcomul himself to his principals.

As the issue of fact, which I have just been discussing, does not appear to have claimed very specific attention from the Court of first instance, I should feel less difficulty, than in most cases, in disposing of it upon the written evidence which comes before us, and therefore of relying upon my own conclusions from that evidence. But I have already pointed out that in the chain of consideration, through which I have been led, one assumed fact is all important, namely that Ramcomul was unquestionably bearing himself in all respects towards the plaintiff as a Banian would. Unfortunately the direct evidence to this is very meagre, and I cannot say that I differ from the Chief Justice in concluding as he does from the whole facts of the case, that the plaintiffs knew all along that Ramcomul was not, in fact, a Banian, and that they never dealt with him on that footing. If this be so, there is an end of the *primâ facie* presumption as to credit which arises from what I may term the custom of Banians, and without that presumption, the evidence is absolutely insufficient to support the defendants' contention. The case thus becomes one of vendor on one side, and the ordinary principal and agent on the other, and the liability to pay rests primarily on the principal. Has the plaintiff shifted this by his subsequent conduct?

There is no dispute as to the length of time which the plaintiff allowed to elapse before he in any way brought his claim to the notice of the defendants, and there is also no doubt that long before this notice reached them, the defendants had closed, or nearly closed their accounts with Ramcomul, and had certainly paid him for the jute, in respect of which this suit is brought. But the defendant was not led to make this payment to his Agent by any laches of the plaintiff; on the contrary, he avowedly made it without any regard as to whether the plaintiff was or was not paid his claim.

There is, therefore, no legal reason on this ground why the plaintiff should not recover in this suit.

Appeal dismissed with costs.

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the estate and effects of E. D. Latapie, an Insolvent vs. *M. S. Owen* p. 150.

The Agent of a Company or private individual, who procures and receives parcels for transmission by his employers, or who by his personal exertions obtains passengers for their Dawk, although he may be entrusted with the receipt or price of carriage, and is paid by commission, is not a broker, or trader, within the meaning of the Insolvent Act. *In the Matter of James Henry Campbell an Insolvent.* p. 177.

The annulling of the fiat contemplated by the proviso of 11. Vic., c. 21, s. 8, applies only to cases in which the original judgment has been the result of mistake of fact, misapprehension, or fraud. *In the Matter of Sreetnarain Bysack, an Insolvent.* p. 180.

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A Policy was effected upon a quantity of piece goods, part in bales, and part in cases. The bales and cases were separately enumerated, and separately valued in the body of the Policy, but the gross total was made up. Held that the words "free from particular average," following directly upon the gross total, must be taken to apply to the whole value of both lots, and not separately to the bales, and separately to the cases. *Berrooppo Setty* vs. *Hursmull Ramchund,* p. 74.

Insurance,—Sea worthiness—Abandonment—Total loss. *Hossein Ibrahim Bin Johur* vs. *Muttyloll,* p. 107.

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Interest at the stipulated rate, no matter how usurious, will be awarded down to decree. The rate at which subsequent Interest is to be awarded is entirely in the Court's discretion. If a Plaintiff has contracted to receive interest at 12 per cent only, that rate will be carried down to decree, but should he have contracted for a higher rate, 6 per cent. only will be allowed. *Dhunput Sing Dogure* vs. *Shaik Golam Hadee,* p. 106.

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LIBEL.

A letter is written by order of the Manager of a firm reflecting upon the character of a professional man, and signed by him, and handed over to a clerk to copy in the ordinary way, in the office copy letter book, which is open to all the members of the firm. Held that such instructions to copy amount to publication. *Heckford* vs. *Galstin* p. 274.

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To constitute a lien on any property there must be a clear agreement for the specific appropriation of the property, and further the property must be in the possession of the party who claims the lien. *In the matter of the claim of Dadie Bibee. Debnarain Bose* vs. *A. S. Leisk.* p. 267.

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ment, is not to proceed by motion, but to give notice of claim which can then be investigated as laid down in Sec. 246.

In the event of a claimant appearing for property attached, the Court will in its discretion postpone all other business, and give precedence to the hearing of the claim. *Rammanik Shaw* vs. *Sheebram Pantool.* p. 22.

A, who has no regular office, but comes once or twice a week from the Mofussil to a friend's house in Calcutta, and sees people there on business, contracts with B in Calcutta for the hire of certain Cargo Boats. While being towed by a Steamer, which A had chartered according to agreement, the boats when beyond the jurisdiction of the Court, sustain great damage by reason of gross negligence on the part of C whom A had placed in charge. Held (1) that the "cause of action" did not arise in Calcutta; (2) that A "carried on business" in Calcutta within the meaning of Sec. XII. of the Charter; (3) that A. must be held responsible to B for the negligence of C. *Greeschunder Bonnerjee* vs. *Collins*, p. 79.

A case entered on the Undefended Board can only be transferred to the Defended Board on payment of the costs of the adjournment, if any, thereby occasioned. *Bindoomadub Mitter* vs. *Woomeschunder Paul* p. 86.

The Court will extend the privileges of Purdah to women, who, though not Purdah, are not accustomed generally to appear before the public. *Kistomohun Mookerjee* vs. *S. M. Adarmoney Dabee*, p. 88.

In the event of a defendant neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence, and should it appear desirable that a written statement should be put in, the case will be adjourned for that purpose at the expense of the defaulting party. *Ramrutton and Goberdhone Doss* vs. *The Oriental Inland Steam Navigation Company "Limited."* p. 89.

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The Court will not issue a Commission for the examination of an Infant of tender years. *In the Matter of Sreemutty Beenodeeny Dossee, an Infant*, p. 152.

Applications under Secs. 74 and 75, Act VIII, on the ground first mentioned in Sec. 74, must shew, at least, that the defendant is about to leave the Jurisdiction

with a view to avoid process, or to delay the plaintiff in the prosecution of his suit. Evidence sufficient to support this must be adduced in all cases. *Teenaram* vs. *Ramrutton*, p. 181.

In all suits under Act VIII, the party on whom the burthen of proof rests is entitled to begin, whether such suits be of the nature of suits in Equity, or of suits at Common Law. *Rammoney Dossee* vs. *Brijololl Day*, p. 182.

In an application made under Sec. 81, Act VIII, the Court must be satisfied that a removal of goods is being made, or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal. *Ramnarain Podder* vs. *Ezekiel Levy*, p. 183.

A decree of the late Supreme Court must be treated as a decree of the High Court, and as subject to the provisions of Act VIII, except so far as the application of any provision of Act VIII, would deprive a party of any right or privilege, under the old procedure. *In the Matter of Muddoosoodun Doss, a Prisoner in the Great Jail of Calcutta*, p. 215.

Where good cause is shown for non-appearance, the Court under Act VIII, may restore to the Board a suit dismissed for default. *Damodur Doss* vs. *Choonee Bebee*, p. 216.

Act VIII makes no provision for compensation of Witnesses for oss of time. *Nawab Nazim of Bengal* vs. *Rajah Prosononarain Deb Bahador*, p. 236.

Where a contract is partly printed and partly written, and there is a conflict between the printed and written part, the written part must be taken to control the printed part. *John Carlisle and others* vs. *Nuthunul Nowlucka and others*, p. 242.

Where two prisoners are charged with distinct offences in the same indictment, the calling of evidence on behalf of one does not give the Crown a right of reply upon the other. *Regina* vs. *Shaik Abbas and Muneeroddeen*, p. 247.

A suit is not barred by the Statute of Limitations as against parties added after the expiration of the period allowed by law, provided the plaint be filed against the original parties prior to the expiration of such period. *Issurepersaud* vs. *Urjoonloll and others*. p. 248.

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The Court will not, except for some very cogent reason, order principal parties to leave the Court during the hearing of a case. *Buddrenauth* vs. *Issureepersaud*, 249.

A plaintiff will not be allowed to set up one case, and having proved another, to ask for issues to be raised to suit the proof, but when a Plaint and its proof necessarily lead to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues and to give the relief thereon to which the Plaintiff is entitled. *Obhoy-Churn Mullick* vs. *Womeschunder Paul*, p. 263.

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The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes. *Barrow* vs. *Archer*, p. 125.

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Principal and Agent—Extent of authority. *R. S. Rundle* vs. *The Secretary of State*, p. 26.

Principal and agent—Extent of authority. *Ross Johnson* vs. *Secretary of State*, p. 153.

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In a suit brought in the High Court, where the plaintiff shall recover less than 1,000 Rs., no costs can be awarded, unless the Judge shall certify, that the action was fit to be brought in the High Court, by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes. *Hurranchunder Gangooly* vs. *Shibchunder Mitter*, p. 237.

SHAREHOLDER.

Defendant applied for 100 shares in a Company, and on their being allotted to him paid Rs. 1,000 deposit. His name was placed upon the Register of shareholders, but he refused to sign the articles of association. Held that he was not liable as a shareholder. *Goosery Cotton Mills Company Limited* vs. *James Steel.*, p. 238.

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See.—Arrest—Lien.

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Mohendronauth Mitter vs. *Koylasnauth Bannerjee*, p. 121.

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The ground upon which a person is restrained from using another's trade mark is, that he is gaining an advantage by the use of a particular trade mark, which is the property of another. It is not necessary to prove intentional fraud, or to shew that persons have been actually deceived. It is sufficient, if the Court be satisfied, that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *Ewing and Co.* vs. *Grant, Smith and Co.*, p. 185.

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